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in international law***

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I. Introduction

With regard to the most serious crimes concerning the international community as a whole, the preamble of the Statute of the International Criminal Court¹ expresses the determination to prevent these crimes by putting an end to impunity. Business often plays an important role in situations of gross human rights violations. This creates a necessity of holding corporate actors to account for international crimes,² as equally as state actors or leaders of armed rebel groups. While there is no doubt that states have the power to restrict corporate behaviour and hold business corporations liable for human rights violations,³ in terms of criminal liability the situation *de lege lata* in national law is disappointing. A 'regulatory vacuum' prevails in many states.⁴ And even in states providing for corporate criminal liability for violations of international law, enforcement of these laws rarely ever happens.⁵ This is why the use of International Law as a next-level solution comes into consideration.

International Criminal Law today is at its peak of development since the entering into force of the Rome Statute and the establishment of the International Criminal Court (ICC) in 2002. However, the jurisdiction of this court only covers natural

1 Rome Statute of the International Criminal Court (2002), in the following referred to as Rome Statute.

2 When speaking of corporations in general, this contribution refers in the first place to transnationally operating firms. According to the United Nations (UN) Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (2003), the term "transnational corporation" ("TNC") is defined as "an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form". It can be used interchangeably with "Multinational Corporation" ("MNC").

3 Cf Beth Stephens, "The Amoral of Profit: Transnational Corporations and Human Rights" (2002) 20:45 Berkeley JInt'l L 45 at 60.

4 Daniel Leader, "Business and Human Rights – Time to Hold Companies to Account" (2008) 8:3 IntCLR 447 at 452.

5 Kaleck interprets the scarcity of proceedings with the personal continuity in business institutions as opposed to political leaders and observes that different standards in the prosecution are applied (Julia Geneuss et al, "Core Crimes Inc.: Panel Discussion Reports from the Conference on 'Transnational Business and International Criminal Law', held at Humboldt University Berlin, 15-16 May 2009" [2010] 8:3 JICJ 957 at 962).

persons and thus excludes juristic persons such as corporate entities.⁶ And even though individual corporate actors can in principle be held responsible before the ICC,⁷ the words of the first chief prosecutor Luis Moreno-Ocampo in 2003, stressing the importance of exploring the financial aspects of international crimes,⁸ have remained without consequences and not lead to investigations in these matters so far.⁹

Although it is beside the point to expect that international criminal law can serve as a 'human rights-enforcement tool',¹⁰ the basic aim that has inspired this work is to explore ways to prevent business involvement in the most serious human rights violations amounting to international crimes.

1. Central Question

The present study takes on the deficit in accountability of globally acting business corporations and explores the suitability and legal feasibility of introducing corporate criminal liability in international law as a solution for corporate involvement in

6 Art. 25 (1) Rome Statute.

7 The liability of individual business actors is not part of the present study, but at the time being the only legal route of ensuring accountability for crimes in the corporate context, cf Hans Vest, "Business Leaders and the Modes of Individual Criminal Responsibility under International Law" (2010) 8:3 JICJ 851.

8 Referring to the exploitation of natural resources by US and European firms during the Civil War in the Democratic Republic of Congo, Luis Moreno-Ocampo, "Communications Received by the Office of the Prosecutor of the ICC", Press release, No: pids0092003-EN (16 July 2003) , online: <http://www.amicc.org/docs/Ocampo7_16_03.pdf> at 4.

9 Vest, *supra* note 7 at 851 et seq; Olek Fauchald & Jo Stigen, "Corporate Responsibility Before International Institutions" (2009) 40 *The GeoWash Int'l LRev* 1025 at 1040.

10 Cf Larissa van den Herik & Jernej L Cernic, "Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again" (2010) 8:3 JICJ 725 at 739 who elaborate that, in terms of corporate responsibility, international criminal law is quite different to human rights law and can provide a remedy only for the most serious human rights violations.

international crimes.¹¹ It is based on the assertion that criminal punishment is an indispensable response to corporate involvement in international “core” crimes.¹²

The question whether the multinationals should be regulated by international criminal law has been in the limelight of academic debate, but is still unresolved.¹³ At present, corporations cannot be held liable before an international forum for violations of international law. This issue was also ignored at the Kampala Review Conference,¹⁴ but it is likely that a further development will happen in regard to the ICC.¹⁵ An evolving concept of penal law concerning business related crimes can be observed in international practice and theory.¹⁶ However, although corporate accountability in international law in general has become increasingly important in the last decades and corporate criminal responsibility is well established in many

11 This study does not deal with the liability of legal persons in the public sector, particularly rebel groups or states. The different status and motivation of (quasi-) governmental organisations require a clear delineation to business corporations, cf the comments of Murphy and Rishmawi in “Workshop Corporate Criminal Liability - Discussion” (2008) 6:5 JICJ 947 at 977.

12 The “core” international crimes, laid down in arts 5 *et seqq* Rome Statute are not the only criminal offences under international law. Other offences are in particular environmental crimes, corruption and emerging human rights related crimes such as torture. These crimes are excluded here, because core crimes represent not only the least common denominator, but also the gravest of all international crimes. It is suggested though that the notion of corporate criminal liability, once it has been recognised, will be applied to all offences in order to create a complete concept.

13 Cf. the special issue on *Transnational Business and International Criminal Law* in (2010) 8:3 JICJ; the Symposium *Holding Multinational Corporations Responsible Under International Law* in (2001) 24 Hastings Int'l & ComplRev 285; and the extensive contribution of Desislava Stoitchkova, *Towards corporate liability in international criminal law* (Antwerp Portland [Or.]: Intersentia, 2010).

14 A review session of the Rome Statute according to art 123 Rome Statute took place in Kampala in 2010. However, since the focus of this session lay on the definition and procedural issues of the crime of aggression, the topic of corporate criminal responsibility was not set on the agenda.

15 Stoitchkova, *supra* note 13 at 18; Clapham considers a case before the ICC necessary which manifests injustice due to the exclusion of corporations from the ICC in order to find political support for amending the Rome Statute (Andrew Clapham, “The Question of Jurisdiction Under International Criminal Law Over Legal Persons.” in Menno Kamminga & Saman Zia-Zarifi, eds, *Liability of multinational corporations under international law* [The Hague; Boston: Kluwer Law International, 2000] at 160).

16 Cf Christoph Burchard, “Ancillary and Neutral Business Contributions to ‘Corporate-Political Core Crime’: Initial Enquiries Concerning the Rome Statute” (2010) 8:3 JICJ 919 at 920 naming concepts such as “international business criminal law”, “international white collar-crime”, and “corporate-political core crime”.

national legal systems,¹⁷ the reluctance of some states demonstrates the controversy in reconciling the foundations of criminal law with the responsibility of legal entities.¹⁸

As the two fields of international law and criminal law are quite distinct, problems of both areas of law arise for themselves and in combination. Fundamental obstacles in (domestic) criminal law theory, such as the principle of culpability, will be considered in the light of the objects and purposes of international criminal law. Key issues in terms of international law are whether corporations in fact have obligations under international law and how a regulation *de lege ferenda* can be constructed in the framework of the Rome Statute. As to the different concepts of attributing criminal liability to the corporate entity, the approach of a draft provision proposed during the negotiations to the Rome statute is considered and a *sui generis* concept suggested.

Apart from the question whether the ICC is actually a suitable forum for bridging the disconnection between multinationals and the law,¹⁹ the implementation of a regulation also raises practical issues, such as the reconcilability of the complementarity principle with the sovereignty of national states not providing for corporate criminal responsibility. Presumably, the prosecution of corporations for international crimes will have to remain in the hands of the states.²⁰

2. Method and Structure

The introductory part continues in Chapter II with an illustration of corporate human rights violations to make the reader familiar with the underlying problem of this study. After that, the accountability gap described above is picked up and the

17 See Guy Stessens, “Corporate Criminal Liability: A Comparative Perspective” (1994) 43:3 IntlCompLQ 493.

18 Cf Stoitchkova, *supra* note 13 at 7 et seq with further references; and the critical contribution of Thomas Weigend, “Societas delinquere non potest?: A German Perspective” (2008) 6 JICJ 927.

19 Cf Stephens, *supra* note 3 at 54 observing a “disconnect between international corporate structures and the law”.

20 See Chapter V.2 for a detailed discussion of the suitable enforcement forum.

need for an international regulation as a means against gross corporate human rights violations demonstrated. Alternative regulatory approaches are considered in order to prove that criminal law is the only appropriate field of regulation on the international level. Further, a central issue is the desirability of holding corporations *as such* to account.

In Chapter III, the study elaborates on the tension between the organisational component in corporate crime and the individualistic notion of traditional criminal law with its underlying philosophic aspects of moral guilt. This contradiction is resolved with a view to the specific objects and purposes of international criminal law.

Chapter IV reviews the *status quo* of corporate criminal responsibility in international law. The first section traces back to the beginnings of international criminal law. In particular, judgements of the International and United States Military Tribunals (IMT and USMT) are analysed. Further, a proposal on the inclusion of legal persons in the jurisdiction of the ICC, which was suggested in the course of the negotiations of the Rome Statute, is assessed to explore the legislative intentions as well as the objections of the delegates leading to the rejection of the proposal. A survey of international instruments is also conducted with view to the development of corporate criminal liability in the recent years. Moreover, obligations of corporations under customary international law are examined as to whether they entail direct criminal responsibility for international crimes.

Eventually, Chapter V deals with implementing corporate criminal liability in international law, particularly extending the jurisdiction of the ICC to private legal persons. The proper forum where prosecution can take place in order to guarantee an effective enforcement is discussed and balanced with the complementarity principle of the ICC. Further, the contextual element and specific intent requirements are examined as to their applicability to legal entities as well as practical challenges regarding the complementarity principle discussed.

In conclusion, after summarising the findings, the scope of this study is put into a greater context and prospect fields warranting further exploration are suggested.

II. Regulating corporate activities

The following section deals with preliminary questions of regulating TNCs. First of all, the possible negative consequences of business investment in terms of serious human rights violations are illustrated and the term of Corporate Complicity introduced. After that, the question whether regulatory mechanisms on the international level are suited for the present purpose or whether regulation on the national level is preferable is discussed.²¹ Further, it has to be established that criminal law is actually the appropriate field of law. In this regard, non-obligatory, administrative, and civil law efforts come into consideration. Lastly, the need to hold the corporate entity as such accountable, and not only the individual actor within the corporate context, constitutes a central part of the discussion.

1. Corporate human rights violations

a. The power of corporations

A strong interdependence between trade and public welfare as well as political stability has existed throughout human history. The early civilizations, such as ancient Egypt, could only create a heritage of sophisticated arts, culture and philosophy based on its thriving trade. Today still, economic growth is a cornerstone for every country's peace and prosperity.²²

In the context of globalised international trade, this basic proposition seems to get distorted under certain circumstances. International trade is growing faster than ever and multinationals are expanding their influence throughout the world, in developed as well as in developing countries. It is unavoidable that firms also face politically

21 Distinct from this problem is the issue revolving around the proper enforcement forum (international regulations could also be enforced by the national states). This question is discussed in Chapter V.2.

22 Cf World Trade Organisation, World Trade Report (Trade and Development, 2003) at 82 emphasising the interdependence of human and economic development.

volatile or repressive host states. In these cases, it might be assumed that business investment always contributes positively to these states' economic development and improves the political, social, and environmental situation. However, the contrary effect can and allegedly has occurred. The downside of direct private investment in the first place is environmental pollution, but it may also support poverty, hunger and poor health in the background of mercenary governments.²³ Private corporations also begin to be involved in sensitive areas such as the management of prisons or even fighting wars as they increasingly take over traditional state activities.²⁴ This requires an increased level of human rights-compliance and a corresponding regulatory framework.

The enormous financial power of multinational corporations, sometimes exceeding the economic power of host states, can lead to a large degree of political dependency of governments on such corporations. This imbalance creates entanglements of corporate officials and political authorities, an alliance which often bears markings of exploitation of land, states, and people rather than a contribution to development.

In isolated cases, even gross violations of human rights can be the direct or indirect consequences of corporate activities.²⁵ The business with repressive governments may support ongoing human rights violations, and even provoke or demand the state to impair human rights. At this point, business is no longer the motor of human development, but in fact poses a great threat to human rights.

23 Stoitchkova, *supra* note 13 at 1 describes the negative consequences of corporate activities aptly as “the dark side of corporate might”.

24 Ronald C Slye, “Corporations, Veils, and International Criminal Liability” (2008) 33:3 *BrookJ Int’l L* 955 at 961; cf regarding the liability of natural persons Chia Lehnardt, “Individual Liability of Private Military Personnel under International Criminal Law” (2008) 19:5 *EJIL* 1015.

25 Gross human rights violations are understood in the present contribution as “the most egregious human rights abuses” affecting the whole community or society they take place in (International Commission of Jurists, “Corporate Complicity & Legal Accountability, Vol 1 - Facing the Facts and Charting a Legal Path” in [2008] at 4 et seq). Although this term is not limited to crimes amounting to international crimes pursuant to art. 5 et seqq of the International Criminal Court Statute (ICC) and might eg also include torture, this study focusses on crimes within the framework of the ICC.

b. Corporate complicity

The ways a corporation can be implicated in human rights violations can take various forms. When the corporation itself (ie a corporate official) actually commits an unlawful act, it becomes a case of direct involvement. The attribution of this type of corporate human rights abuses is not difficult to handle since the corporate actor is responsible by causation. Cases of direct involvement can be traced back to the colonial era, when multinational enterprises such as the Dutch East India Company heavily engaged in slave trade and exploitation of natural resources.²⁶ An unprecedented example of direct corporate involvement in human rights abuses took place in the Holocaust of Nazi Germany.²⁷ The post-World War II trials held at Nuremberg (Nuremberg trials)²⁸ also mark the starting point at which international law began to deal with business involvement in international crimes. However, since that time direct involvement can rarely be observed. The most obvious, but not necessarily unproblematic case in recent times has been the killing of civilians by mercenary soldiers of the private military firm Blackwater during the Iraq War.²⁹

The challenge nowadays is rather to deal with an *indirect* involvement of corporations in international crimes, actually committed by government forces or non-state actors such as armed rebel groups. In these cases, the corporate conduct appears *prima facie* to be morally and legally neutral.³⁰ But having a closer look, the

26 Cf Stephens, supra note 3 at 49 on the “Corporate Human Rights Problem”.

27 For an extensive examination of transnational corporations and the Holocaust, see Stephens, supra note 3.

28 The general term “Nuremberg trials” includes different military tribunals. The major war criminals (ie the highest ranking political and military leaders) were tried before the International Military Tribunal (IMT), established by The London Charter of the International Military Tribunal (1945). Subsequently, the United States of America (USA) created a national military tribunal (USMT) under Law No. 10 on the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (1945) to try a series of other selected war criminals (“follow-up trials”). For a discussion of the judgements by the USMT, see Chapter IV.1.

29 For an overview of the proceedings against the firm itself and its employees, see Wilhelm Huisman & Elies van Sliedregt, “Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity” (2010) 8:3 JICJ 803 at 816 (fn 54).

30 The problem of neutral contributions to crimes, defined as “contributions ... not necessarily imply[ing] a specific social harm or an unacceptable danger to protected legal interests” by Burchard, supra note 16 at 921 (fn 6), is not an issue arising only in the international sphere. It is therefore not dealt with in detail.

corporation is somehow implicated with the perpetrator(s) as it is a beneficiary of the profits generated from human rights violations. Many examples are worth mentioning to illustrate the danger of doing business in the vicinity of difficult human rights situations. For example the petroleum company Shell has to defend several lawsuits for being involved in the executions by state forces of protesters against the company's activities in Nigeria in the early 1990s.³¹ A few years later, an Indian subsidiary of the US-corporation Enron, one of the former world's largest energy companies, unlawfully influenced the local government and made use of Indian police forces to violently oppress local resistance against a massive energy project.³²

A very recent example shows at which risk corporations doing business with repressive states are to get involved by mere acquiescence in human rights abuses carried out by the government of the host state. According to a report of Human Rights Watch (HRW), one of the leading international non-governmental organisations in the human rights sector, the Canadian firm Nevsun Resources has become complicit with forced labour allegations against the government of Eritrea.³³ Nevsun entered into a joint venture with a state owned construction company to mine the vast and largely unexplored gold reserves in Eritrea. This construction company receives support of conscripts from the "national service program", a governmental initiative forcing an enormous number of Eritreans to work for an indefinite time period under abusive conditions. Nevsun did not conduct a human rights due diligence before engaging in the project, but tried to clear up the allegations with the Eritrean company after being informed by HRW. These efforts, however, were obstructed in total by the other side. Instead of giving up the project, Nevsun is continuing to operate the mine. Because of that HRW accuses the firm of having

31 Cases against Shell have been filed before US (national) courts for violations of international law under the Alien Tort Claims Act (ATCA), see *Wiwa v Royal Dutch Petroleum Co*, 226 F3d 88 (2nd Cir 2000) and most recently *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010). The latter case is also examined in Chapter IV.4.b.

32 See Human Rights Watch, *The Enron Corporation – Corporate Complicity in Human Rights Violations* (1999).

33 Human Rights Watch, *Hear No Evil - Forced Labor and Corporate Responsibility in Eritrea's Mining Sector* (2013).

become *complicit* in the human rights abuses of the Eritrean government by quietly accepting forced labour at its own mine site.

The term “Corporate Complicity” has been shaped by HRW to express morally wrongful involvement of corporations in human rights abuses.³⁴ It did not express a legal conviction though and had thus no elements of crime.³⁵ To transform this moral concept into a legal concept presupposes a clear definition of complicity. The Expert Legal Panel on Corporate Complicity of the International Commission of Jurists (ICJ) determines the threshold to legal responsibility using the principles of causation, knowledge and proximity, according to which the 'zone of legal risk is entered if (1) the corporate conduct enabled, exacerbated or facilitated human rights violations abuses', (2) the corporate officials knew or should have known the likelihood that their actions would contribute to the human rights abuse, or (3) the business activity was close or proximate to the perpetrator or victims (geographically, but also in terms of the duration, frequency or intensity of interactions or relationship).³⁶

Although the threshold for liability is at the heart of constructing legal responsibility for business involvement in criminal offences, it will not be recessed here in depth.³⁷ As a preliminary issue applying to natural and juristic persons equally, it is not of direct relevance for the purpose of the present study.

34 Cf Human Rights Watch, *supra* note 32.

35 Roth in note 11 at 959 et seq.

36 International Commission of Jurists, *supra* note 25 at 8 et seq.

37 For a thorough examination, see Norman Farrell, “Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals” (2010) 8:3 JICJ 873; and Burchard, *supra* note 16; cf also Anita Ramasastry, “Corporate Complicity: From Nuremberg to Rangoon – An examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations” (2001) 20:91 Berkeley JInt'l L 91 at 117 developing a standard for corporate complicity from the findings of international criminal tribunals.

2. The need for international regulation

First of all, it is questionable whether it is not the domestic state, ie the home state or host state,³⁸ which is the preferable actor to ensure corporate accountability. In fact, with regard to maintaining internal order, national regulation comes by its very nature prior to international regulation. Further, special provisions such as in corporate law, labour law, and environmental law are much closer to the specific conditions within the corporate operating field and consistent with the domestic legal system. The need for regulation of corporate activity by international law can thus only exist as far as domestic law has proven ineffective.³⁹ In this regard, the failure of states, if not inability at all, to control transnational business activities comes into consideration.

In the course of globalisation, corporations have become able to act flexibly on a transnational level while domestic legal systems to a large degree have remained bound to their territory.⁴⁰ This has created a *disconnection* of the international corporate structures from the law.⁴¹ Stephens observes that TNCs have 'outgrown' the national legal structures, 'reaching a level of transnationality and economic power that exceeds domestic law's ability to impose basic human rights norms'.⁴² While multinationals act in a network of affiliated companies, law focusses on 'each component company, rather than on the group, as the legal actor'.⁴³ Firms also tend to shift legal forms in order to prevent liability, which creates legal barriers for accountability.⁴⁴ Often, the state of incorporation has only been chosen for tax

38 While home state refers to the state of incorporation, host state means the state where the corporate wrongdoing actually takes place.

39 Cf Fauchald & Stigen, *supra* note 9 at 1027.

40 As a constraint, the efforts the World Trade Organization (WTO) for harmonising rules of trade between nations are highlighted.

41 Stephens, *supra* note 3 at 54.

42 Ibid.

43 Phillip Blumberg, *The multinational challenge to corporation law: the search for a new corporate personality*. (New York: Oxford University, 1993) at 205.

44 Cf Stoitchkova, *supra* note 13 at 9; see below Chapter II.5 regarding the problem of "piercing the corporate veil".

reasons or other advantages, but does not form the actual seat. Further, the flexible “de-nationalised” structure with multiple production facilities enables TNCs to escape national regulation by shifting assets and moving activities between the countries. TNCs can therefore truly be regarded as global players in the sense that their field of operation is the whole globe, not the territory of a single state.

Any regulatory approach, whether civil, criminal or administrative in nature, needs to match the structures of multinationals to create a level playing field.⁴⁵ As Stephens substantiates, this 'requires international consensus on the norms applicable to corporations' as well as 'coordinated enforcement mechanisms, whether through international systems or through coordinated domestic structures'.⁴⁶ Only an international regulation provides a uniform and consistent level of accountability.

The need for an international regulation is increased by the practical difficulties of states to effectively enforce existing regulations. As touched on in the introduction, host states in politically and economically unstable conditions *de facto* do not have the power to hold firms accountable. In fact, they are often depended on them and will therefore acquiesce to their will which is dominated by the aim of profit maximisation. '[S]tates may prefer the investments and the economic activity of a culprit-corporation over the need to protect their citizens from such a corporation', or even collaborate with the corporation's deeds.⁴⁷ For this reason, TNCs in some cases even deliberately choose to invest in politically weak states in order to avoid regulatory patronising.⁴⁸

This aspect is also relevant in terms of formal design of an international regulation. Speaking of this, what we have in mind is mostly direct regulation, ie that obligations are imposed directly on corporations as subject of international law.⁴⁹ On

45 Blumberg, *supra* note 43 at 201.

46 Stephens, *supra* note 3 at 48 and 59.

47 Mordechai Kremnitzer, “A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law” (2010) 8:3 JICJ 909 at 916–917.

48 Slye, *supra* note 24 at 961.

49 The legal question whether international law ascribes legal subjectivity to business corporations is discussed in Chapter IV.4.a.

the other hand, it is also possible to only indirectly regulate corporations by committing national states to impose obligations on corporations under domestic law.⁵⁰ The difference, and also the reason why an indirect regulation does not solve the present problem, lies in its legal effect. The implementation and enforcement of indirect obligations is left to each national state, which could only be held responsible for violating the duty to legislate. Vis-à-vis business corporations as the actual addressee, however, indirect obligations as such have no legal effect under international law at all.⁵¹ Having in mind the regulation gap at the domestic level, transnational corporate activities can only be effectively held to account by subjecting them directly to international law without any intermediary steps. Further, regarding the insufficient enforcement of existing domestic regulation, only direct regulation creates the possibility to hold corporations liable before an international institution.

3. Nature of regulation - Why criminal law?

Once the necessity for an international regulation is demonstrated, the question arises, which field of law is most suitable. It is noteworthy at this occasion that business corporations in many domestic jurisdictions can be made responsible under different laws *concurrently*, while international law provides only for criminal liability of non-state actors.

a. Soft law instruments

At first, a regulation of legally not binding nature comes into consideration as the least restrictive measure. This has been the approach of several international law initiatives on the regulation of multinational corporations, such as the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN Global Compact,

⁵⁰ The indirect regulation by international law is a common practice in many international instruments as demonstrated in Chapter IV.3.

⁵¹ Fauchald & Stigen, *supra* note 9 at 1031.

and the Institutional Integrity Department of the World Bank.⁵² These instruments in part explicitly 'recommend'⁵³ but also urge business to respect 'internationally recognised human rights'.⁵⁴

However, the flaw of non-binding efforts lies in two characteristics. Firstly, they do not specify clear and enforceable rules but rather express general guidelines.⁵⁵ They are hence to be classified as a policy tool, but not a regulation in the strict sense. A voluntary instrument can further not be enforced against the will of its addressees and does therefore not constitute a solution for the present demand.⁵⁶

b. Private law versus criminal law

In the domestic law of the USA, civil claims under the Alien Tort Claims Act (ATCA)⁵⁷ have proven to be a 'central mechanism' of holding transnational corporations accountable for human rights violations.⁵⁸ Civil law suits for tort have the advantage of fulfilling the financial needs of the victims by awarding damages and simultaneously providing pecuniary punishment for the defendant. Responsibility under private law could thus very well be a solution also at the international level.

However, it has to be stressed that the structure of international law is not fully developed with regard to civil action. While many national systems have established a sophisticated interplay of sanctions and reparations for corporations in different

52 Organisation for Economic Co-operation and Development, OECD Guidelines for Multinational Enterprises, 2011 Edition (Paris: OECD Publishing, 2011).; International Labour Organisation (ILO), Procedure for the Examination of Disputes Concerning the Application of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (2001); for The United Nations Global Compact (1999) see <<http://www.unglobalcompact.org>>; The World Bank Group, Improving Development Outcomes: Annual Integrity Report, I, Report No. 41901 (2007).

53 Art 1 of the Declaration on International Investment and Multinational Enterprises, Ibid at 7.

54 Ibid, paragraph 2 of Part II (General Policies).

55 Cf for an in-depth analysis van den Herik & Cernic, supra note 10 at 733.

56 Likewise Stoitchkova, supra note 13 at 13.

57 28 U.S.C. § 1350 (1994).

58 Katherine Gallagher, "Civil Litigation and Transnational Business: An Alien Tort Statute Primer" (2010) 8:3 JICJ 745 at 1.

fields of law, no such “holistic” system exists on the international level. The foundation of international law is not the all-encompassing sovereignty of a national state, but merely a patchwork of delegated powers. International law originally exclusively dealt with states, and non-state actors were made subject only with the introduction of criminal liability for violations of international law. Today still, there are no alternative institutions to criminal tribunals on the international level.⁵⁹ The argument from a domestic law context, that a functioning system of corporate responsibility other than criminal liability is in place, does not apply in the international context.⁶⁰ In fact, this lack of legal remedies currently renders TNCs immune from responsibility for violations of international law,⁶¹ and produces the difficulties leading to the main question of this paper.

Further, the practical hurdles of civil proceedings against TNCs should be highlighted. In civil law the burden of proof is on the plaintiff. Hence, criminal law takes preference as the state is responsible for investigating the matter, collecting evidence, and initiating proceedings.⁶² This takes a lot of pressure from the victims, who most often not have the resources to file a lawsuit or settle the case in seeing that the chances of success are unpredictable.⁶³ Moreover, as in many domestic jurisdictions, the victim may be provided with legal remedies to force criminal investigations,⁶⁴ which is an important step towards bridging the enforcement gap. Criminal sanctioning thus 'may be the only mechanism to be able to confront big and strong corporations'.⁶⁵ Simultaneously, criminal proceedings also serve to protect the corporation on trial since the highest level of due process is applied. This is

59 Cf Fletcher in note 11 at 979.

60 Cockayne in Ibid at 955 referring to Weigend, supra note 18 at 942.

61 Cockayne in note 11 at 955.

62 Cf Kaleck in Geneuss et al, supra note 5 at 966.

63 Cf Eric Engle, “Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?” (2006) 20 StJohn’s JLegal Comment 287 at 312 et. seq. with further references referring to the “Winner takes it all” rule in civil law.

64 Cf the argument of Swart in note 11 at 952.

65 Kremnitzer, supra note 47 at 916 demanding at least a binding effect for civil action of facts established in criminal proceedings.

especially important in regard to the seriousness of an accusation for international crimes.

On the other hand, civil litigation seems to serve the goal of justice more effectively in contrast to criminal law with its higher burden of proof and sophisticated procedural standards for the protection of the accused. This argument holds even more since, as Gallagher points out, the legal nature of the proceedings is less important considering that the need of victims in the first place is not compensation, but recognition of what happened to them.⁶⁶ Civil litigation is consistent with a victim-centred view, for the principle of party disposition allows for the victim as the central figure to hold the judicial proceedings in its hands.

However, a compelling counterargument, based on the gravity of egregious human rights abuses, challenges this general consideration. Clapham pleads to take corporate crime seriously by legitimately demanding to treat 'the death of hundreds of people through corporate recklessness ... the same way as a single death through individual thoughtlessness'.⁶⁷ In short, there is just no way around criminal punishment when speaking of gross human rights violations of concern to the international community as a whole.⁶⁸ This also puts into question the victim's disposition over the proceedings. When the international community is concerned, party disposition can hardly be reconciled with the public interest and the right of all nations to inflict punishment.⁶⁹

In terms of prevention as a goal of international criminal justice, only a criminal judgement labels serious human rights violations as what they are, crimes.⁷⁰ This

66 Gallagher in Geneuss et al, supra note 5 at 975.

67 Cf Clapham, supra note 15 at 195.

68 Alike Kremnitzer, supra note 47 at 915.

69 It must be noted, though, that the principle of *ex officio* disposition and generally the goal of establishing the truth is being constrained by the common practice of plea bargaining. For a thorough examination, see Michael P Scharf, "Trading Justice for Efficiency: Plea-Bargaining and International Tribunals" (2004) 2:4 JICJ 1070.

70 Cf Zappala in note 11 at 973.

stigmatisation produces an increased deterrent effect in contrast to tort law damages.⁷¹ For the same reason are administrative sanctions not a suitable response to corporate involvement in core international crimes. Non-criminal sanctioning generally implies a picture of misdemeanour.⁷²

Notwithstanding, it is not argued here that civil law is an unsuitable field of law for dealing with international crimes, but that the stigma of criminal sanctioning is indispensable. With regard to many domestic legal systems differing between public and private law, the relationship between civil law and criminal law is rightly described as *parallel*. The flip side of every criminal responsibility is civil liability side by side.

4. Corporate accountability – Why corporations?

At the heart of the discussion about accountability for business involvement in human rights abuses lies the question, whether subject of the liability should be the individual corporate official(s) only, or also the corporate entity itself. While the liability of individual business actors is well established in international criminal law,⁷³ the present study pursues to demonstrate the need for a liability of the legal person *as such*. This aspect needs further discussion since it is by some authors not only held unnecessary to combat corporate human rights abuses,⁷⁴ but also rejected for legal reasons.⁷⁵

71 Ramasastry, *supra* note 37 at 153; On the other hand, Adam G Safwat & Sara Sun Beale, “What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability” (2004) 8 *BuffCrimLRev* 89 at 101 et seq question whether the deterrence argument may backfire when criminal punishment for corporations is “actually the least costly penalty from the firm’s point of view”.

72 Kremnitzer, *supra* note 47 at 915 points out that “[w]hen non-criminal liability is imposed for a very serious crime committed consciously, it puts the severity of the crime and the importance of the protected value in doubt, if not in disrepute.”

73 Cf. Florian Jessberger, “On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial” (2010) 8 *JICJ* 783.

74 Farrell and Werle in Geneuss et al, *supra* note 5 at 971 et seq. for example hold international criminal law *de lege ferenda* as sufficient to combat corporate crime.

75 Weigend, *supra* note 18 raises fundamental legal objections which will be discussed extensively in Chapter III.

a. Coexistence of individual and corporate liability

First of all, it is made clear that the relation between the two subjects of liability should not be alternative but *cumulative*. Corporate liability is not supposed to substitute, but to complement individual liability. In collective crime, wrongful behaviour exists on the individual as well as on the organisational level.⁷⁶ The problem of double jeopardy (*ne bis in idem*) is not of concern here since the liability attaches to different subjects of law, ie the individual and the corporate entity. Further, the objection that organs of a corporation may use the legal entity to shield themselves from individual responsibility is without any reason.⁷⁷ It might be appropriate though to try the corporation before an international forum and the individual perpetrator(s) before a domestic court instead.⁷⁸ By that, pressure of powerful corporations on the state to limit the liability of the corporation can be antagonised, as the financial and political influence of TNCs diminishes on the international level.⁷⁹

b. Reference to domestic law

The notion of corporate criminal liability may be backed by the trend in domestic law since the recognition in national jurisdictions creates a '*prima facie* indication of its utility'.⁸⁰ Not only is corporate criminal liability well established in common law countries, but also has a 'fundamental shift' recently been observed in the civil law systems of western European countries, which traditionally rejected this notion.⁸¹ On the other hand, this issue has never ceased to be contested.⁸² A comparative survey also is to be regarded with caution, as the understanding of criminal liability itself

⁷⁶ For the organisational component in corporate crime, see Chapter III.1.

⁷⁷ Kremnitzer, *supra* note 47 at 917.

⁷⁸ The suitable enforcement forum is discussed at length in Chapter V.

⁷⁹ Kremnitzer, *supra* note 47 at 917.

⁸⁰ *Ibid* at 914.

⁸¹ See the in-depth analysis of Safwat & Beale, *supra* note 71 at 105 et seq.

⁸² Cf *Ibid* at 97 et seq. on the criticism in the USA.

may differ in each legal system.⁸³ And after all, as touched on above, responsibility and subjectivity in international law has developed from a totally different starting point as national laws, and is therefore only limited comparable. Not at least due to the legitimacy concerns about international criminal courts in general, as Goti suggests, 'prosecutions should be limited to cases of shared basic intuitions across national boundaries and cultures as to the reprehensibility of acts'.⁸⁴ In fact, it would be daring to induce the permissibility of corporate criminal liability in international from national developments. Then again, it does neither serve as a counter argument.

c. Aims of international criminal justice.

A fundamental argument for the inclusion of corporate liability is that the conviction of individuals cannot appropriately reflect the dimension of the wrongful action. This concerns particularly the purpose of international criminal proceedings to create an accurate historical record.⁸⁵ Establishing the truth is an important aspect in the context of transitional justice, where the proceedings are an important part of reprocessing the past. The individualisation of responsibility can produce distortions of the historical reality.⁸⁶

An example illustrating this effect can be found in the atrocity of ethnic cleansing in Yugoslavia. The trials of individuals pretend a picture of only a small group of leaders being responsible. However, the supportive attitude of a large part of the population at that time casts a shadow of guilt over the whole country.⁸⁷ Similarly, with regard to the atrocities of the Rwandan Patriotic Front (RPF) for example, Roth describes that 'it makes a world difference whether there were a handful of

83 Celia Wells, *Corporations and criminal responsibility*, 2nd ed. ed (Oxford; New York: Oxford University Press, 2001) at 129.

84 M Goti in Geneuss et al, *supra* note 5 at 971.

85 Note, "Developments in the Law - International Criminal Law: The promises of international prosecution" (2001) 114:7 HarvLRev 1957 at 1973.

86 Mirijan R Damaska, "What is the Point of International Criminal Justice?" (2008) 83:1 Chi-Kent LRev 329 at 333.

87 As Damaska (Ibid at 333 with further references) explains, the trials of individuals were intended to antagonise an impression of collective responsibility and thus to promote national reconciliation.

individuals that were responsible for crimes against humanity here or there, or whether the RPF, as a corporate entity was responsible.⁸⁸

This equally holds in a corporate context, and generally collective entities sharing a common purpose. It is a common impression that within an organisation individuals are chosen as a kind of scapegoat in order to prevent clearing the whole extent of wrongdoing. Only direct liability of the legal entity is capable to address the collective culture in which the crime occurred. After all, business corporations are perceived as real and accountable actors by the public.⁸⁹ It thus touches the core of justice and turns the principle of equality before the law upside down, when low-ranking officials are punished but the corporation as the patron is immune.⁹⁰

A similar argument turns on deterrence as basic aim of criminal punishment. In terms of prevention of corporate wrongdoing it seems logical to address the corporation itself. In fact, 'effective deterrence of collective actions requires systemic punishment'.⁹¹ As decision making and division of labour in a firm is a process that exceeds the fault of the single employees, individual punishment misses the actual aim.

Further, the lack of tort law remedies on the international level serves as an argument for the use of corporate criminal prosecution. A simple utilitarian approach takes on the financial potency of TNCs. Since compensation is an important aspect of promoting justice for the victims apart from acknowledgement, pecuniary punishment of firms is a powerful tool.⁹² This also serves justice for the individual perpetrators, as the employees are generally neither direct beneficiaries of the corporate crime, nor do they have the financial resources like a firm. By

88 K Roth in: note 11 at 976 accuses the ICTR from having run away from this question.

89 Maurice Punch, "The organizational component in corporate crime" in James J Gobert & Ana-Maria Pascal, eds, *European developments in corporate criminal liability* (Routledge, 2011) at 101 et seq.

90 Kremnitzer, *supra* note 47 at 914.

91 Slye, *supra* note 24 at 960.

92 Clapham in Geneuss et al, *supra* note 5 at 972 sees the fact that companies had "deep pockets" as a legitimate answer to the question why international criminal law is discussed in the context of corporate human rights abuses.

implementation of an adhesive procedure (*partie civile*), victims would be able to claim compensation from the corporation directly through the criminal proceedings.⁹³ However, criminal sanctioning for the sake of reparations alone (a private law matter) seems beyond the point. In fact, corporate criminal liability is not even required for this purpose. If it is only about reparations then a tort adhesive procedure against the firm could as well be implemented in the trial of an individual corporate official.⁹⁴

d. Systemic element in international crimes

A systemic (policy) element is inherent to international core crimes. The core crimes laid down in arts 5 *et seqq* Rome Statute often presuppose collective action, such as a 'widespread or systematic attack' for crimes against humanity as well as war crimes 'committed as part of a plan or policy'.⁹⁵ Similarly the crime of genocide, although not expressively required, is interpreted to usually involve collective action. Hence, the challenge of dealing with crimes committed by organised groups is not unknown to international criminal law.⁹⁶ In favour of collective liability Zappala therefore legitimately asks whether it is 'not the very nature of international crimes to go beyond individual culpability'.⁹⁷

This corresponds to the challenges international criminal justice has to cope with today. Changing social realities require an adaptation of the way liability is attributed. As the governmental and societal structures change, also criminal activity is no longer organised on the basis of strict command and control. In particular the nature of warfare has changed in the aftermath of the terrorist attacks of "9/11" in the USA. Hierarchical structures are more and more flattened and replaced by networked

93 Cf Gaeta in note 11 at 975.

94 Cf Fletcher and Murphy in: Ibid at 977.

95 Arts 7 and 8 of the Rome statute.

96 Cf Slye, *supra* note 24 at 961.

97 Zappala in: note 11 at 973. Only the approach followed by the Rome Statute is different. Instead of punishing the collective entity who committed the crime, the individual participation in that crime is criminalised (Cf Clapham, *supra* note 15 at 145.). For a detailed discussion regarding the implementation of corporate criminal responsibility into the Rome Statute, see Chapter V.

relationships. TNCs can potentially be an important part of such a network without directly getting involved in attacks and atrocities. After all, criminal responsibility will thus have to be determined rather by the criteria of 'influence, culture and collective enterprise' than individual guilt.⁹⁸

e. Evidentiary problems

At a first glance, it may seem a great challenge to proof collective wrongdoing in contrast to mere individual criminal conduct. On the other hand, there are also huge difficulties in establishing individual fault within a collective entity operating with division of labour in non-hierarchical structures. This problem gets far more complicated in the context of business since responsibility is not similarly clear to determine as in state or military organisations.⁹⁹ The liability of legal entities actually has practical advantages to individual responsibility. It can be more difficult to prove that an individual has committed a crime, than to prove that 'the entity itself is organised in such a way that crimes happened', especially in cases of omission.¹⁰⁰ It is the very nature of corporate crime that several individual actors contribute to the crime in different ways. They act under the firm policy and are generally replaceable.

Moreover, if the actions of individuals do not suffice to hold any of them liable, or if the individual perpetrator is absconding, deceases or becomes unable to stand trial, the crime remains unpunished at all.¹⁰¹ Reclaiming the fundamental aim of international criminal justice to end impunity, the legal framework must provide for means to come to a conviction in these cases as well.¹⁰² Under this maxim, corporate liability is not only a solution for the difficulties in attributing responsibility to corporate officials, but for preventing impunity in general.

⁹⁸ Cockayne in note 11 at 957.

⁹⁹ Cf Kaleck in Geneuss et al, supra note 5 at 963.

¹⁰⁰ Clapham in note 11 at 970.

¹⁰¹ Slye, supra note 24 at 962.

¹⁰² Kremnitzer, supra note 47 at 913.

Eventually, with a view to proceedings before the ICC it has to be noted that cases concerning international crimes always involve complex factual circumstances.¹⁰³

f. Conclusion

After all, there are strong arguments in favour of holding the corporate entity criminally responsible. For the rest, it has to be stressed again that nothing is lost by introducing corporate liability since individual liability is not supposed to be blocked out. Both forms of liability address different different legal subjects and do therefore coexist as an *aliud*.

5. A word on corporate groups

Although the details of a suitable legal approach to corporate liability cannot be analysed in this study, an issue which is of great relevance in the context of regulating TNCs should be highlighted here.¹⁰⁴ Multinationals are in practice organised in a group structure and operate in networks of subsidiaries and suppliers. This marks an important difference to state agencies, which are rather hierarchically organised. The parent company's assets can be quarantined from liability by delegating high-risk operations to foreign subsidiaries with limited liability. In fact, the majority of firms involved in international crimes are local actors. In the case of legal proceedings, these subsidiaries can be liquidated and assets shifted within the group to escape liability. By doing so, TNCs apparently exploit the principles of separate legal personality and limited liability.¹⁰⁵ It is therefore an essential aspect of regulation to provide for a mechanism to “pierce the corporate veil” of the subsidiaries and hold the parent company responsible. Interestingly, international criminal law is not unprepared for these constellations. The concept of *superior*

103 International Commission of Jurists, “Corporate Complicity & Legal Accountability, Vol 2 - Criminal Law and International Crimes” in (2008) at 56 et seq.

104 See Stoitchkova, *supra* note 13 at 139 et seqq. for an in-depth examination of “culpability beyond the confines of the corporate form”.

105 *Ibid* at 19.

*responsibility*¹⁰⁶ for example can be seen as a suitable tool for constructing criminal responsibility of parent corporations in relation to offences committed by subsidiaries.¹⁰⁷

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106 Art 28 (b) Rome Statute.

107 See Stoitchkova, *supra* note 13 at 159 et seq.

III. Criminal responsibility and the corporate entity

The catchy statement that corporations have 'no soul to damn, no body to kick'¹⁰⁸ is frequently cited by opponents of corporate criminal liability¹⁰⁹ and demonstrates the difficulties in squeezing the corporate entity into the dogmatic framework of criminal responsibility. This Chapter evaluates the fundamental challenges the characteristics of corporations pose to the traditional concept of criminal responsibility. Central to the discussion are the frictions between corporate crime as organisational deviance and the moral guilt premise in criminal law theory. The principle of *nulla poena sine culpa*,¹¹⁰ being one of the key principles of criminal law, is a major doctrinal obstacle for imposing criminal liability on corporations. As these issues are largely identical with the debate in domestic criminal law systems, a focus is set on the complexity international law adds to the debate.

1. The organisational component in corporate crime

In contrast to individual criminal action, crime with a collective dimension bears fundamental differences not only quantitatively due to its escalating impact, but also *qualitatively* with regard to its criminological causes and *modus operandi*.¹¹¹ This holds especially for TNCs, for they operate in a worldwide network of subsidiaries and responsibilities are spread to various management levels. The determination of a reproachable act (or omission) entailing criminal responsibility is affected by these peculiarities.

108 Baron Thurlow cited in Wells, *supra* note 83 at 76.

109 Eg John C Coffee, “‘No Soul to Damn: No Body to Kick’: An Unscandalized Inquiry into the Problem of Corporate Punishment” (1981) 79:3 *MiL* 386.

110 The maxim translates from Latin to “No punishment without guilt”. It traces to a deeply ethic understanding of criminal law and implies that criminal punishment requires the ability to make a moral choice.

111 Cf Stoitchkova, *supra* note 13 at 23.

Stoitchkova rightly points out that '[c]orporate crime materialises through collective action (or blameworthy inaction) and cannot be detached from the institutional framework in which it takes place'.¹¹² This assumes, according to Punch, 'that in some way the firm's institutional context and culture shape an environment that encourages, colludes or is culpably blind to law-breaking'.¹¹³ Collective deviance is also accommodated in international crimes, with the distinction that the collectives mostly are states or organised military groups.¹¹⁴ It is 'irrespective of their nature and goals [that] groups have the propensity to legitimise immoral, or even illegal decisions and actions. They feature a "culture of normality", which routinises decision-making, rationalises choices and serves to defuse the moral connotations of deviant practices.'¹¹⁵

The essence of organisation theory is that organisational decision making involves negotiations of different parties and does not go by the preferences of any individual. It is the process itself which amounts to an autonomous decision of the legal person.¹¹⁶ '[C]orporations exhibit their own special kind of intentionality, namely corporate policy',¹¹⁷ which extends beyond the mere sum of the individual's state of mind.¹¹⁸

2. The individualistic nature of criminal responsibility

It is questionable where the traditional hesitation of some domestic jurisdictions towards the notion of corporate criminal responsibility stems from. Most notably, when tracing back the historical development of criminal justice, in particular

¹¹² Ibid at 28. This phenomenon is the basis of the argument raised above for the introduction of corporate liability, that individual liability will never "get the whole picture", cf. Chapter II.

¹¹³ Punch, *supra* note 89 at 101.

¹¹⁴ Stoitchkova, *supra* note 13 at 23.

¹¹⁵ Ibid.

¹¹⁶ Cf Slye, *supra* note 24 at 963 with further references.

¹¹⁷ Fisse and Braithwaite (1988), cited in Wells, *supra* note 83 at 71.

¹¹⁸ The determination of the corporate *mens rea* is dealt with in Chapter V.

Western European civil law systems originally acknowledged corporate liability.¹¹⁹ It was only in the course of the French revolution and the advent of individualism that criminal law focussed solely on individuals.¹²⁰ The historical background bespeaks the underlying ideological dimension, namely the discovery of the individual, abstract from relationships and the community it exists in.¹²¹ Since criminal law in terms of its foundations is intertwined with ethical concepts of its time, the 'historically specific cultural emphasis on the individual rather than on the community or society' was influential to the idea of criminal responsibility.¹²²

The individualistic preoccupation of criminal law has shaped the legal requirements of criminal responsibility over time. As legal systems have subsequently approached the notion of corporate liability, difficulties arose in the effort of applying existing instruments to legal entities. It is not only that the *actus reus* requirement is affected by the idea of direct causation, which links the liability to an act (or omission) carried out by a human being. The seemingly insurmountable obstacle is particularly that fault ascription presupposes the ability to act rationally and autonomously,¹²³ which assumes the existence of some mental element (*mens rea*).¹²⁴ Consequently, criminal responsibility presupposes a moral agent, featuring 'a sense of the self, a free will, and a moral conscience', and thus implying the existence of a human actor.¹²⁵ Corporations in contrast, as legal fictions by nature, lack (at

119 Stessens, *supra* note 17 at 494.

120 Stoitchkova, *supra* note 13 at 28.

121 See Wells, *supra* note 83 at 72 et seq for a lengthy analysis of this fundamental cultural shift.

122 Ibid at 64. The maxim '*societas delinquere non potest*' is prevalent since then. It describes the inability of legal persons to commit a delict and has served opponents of corporate criminal liability as a striking argument.

123 Michael Moore, "The Moral and Metaphysical Sources of the Criminal Law" in James Pennock & John W Chapman, eds, *Criminal justice* (New York [u.a.]: New York Univ. Press, 1985) at 23.

124 For a discussion of arguments against strict subjectivism, see Wells, *supra* note 83 at 66–67.

125 Ana-Maria Pascal, "Philosophical underpinnings of corporate criminal liability" in James J Gobert & Ana-Maria Pascal, eds, *European developments in corporate criminal liability* (Routledge, 2011) at 33, .

least) a moral conscience.¹²⁶ In a conventional individualistic understanding they are therefore excluded as non-accountable, together with animals, infants and insane.¹²⁷

The debate emerging from the assertion that legal entities cannot be regarded as a moral agent, is controversial to its details and goes deeply into philosophical issues, ranging from the metaphysical existence of corporate personality to moral agency.¹²⁸ Wolf outlines the problem by asking, '[a]re organisations ever morally blameworthy themselves or is the apparent blameworthiness of organisations always more properly regarded as a function of the blameworthiness of some or all the individuals in it?'¹²⁹ The debate not only comprises the difficulties of distinguishing the behaviour of the individual actors from that of the corporate entity, but also the very question whether the legal entity in the metaphysical (ie descriptive) sense has a personality beyond the mere aggregate of its individuals. At the bottom of the discussion are the irreconcilable schools of individualists and collectivists, having a common ground only on the view that in terms of moral responsibility the same criteria should apply to both humans and corporations.¹³⁰ At the same time, however, they become fixated on the morality paradigm and thus 'lapse into the moral agency mire which is in itself a never-ending source of contention'.¹³¹

It becomes clear against this backdrop that it cannot be the solution to simply apply the existent (individualistic) principles of traditional criminal law to legal entities. Criminal law itself to a large degree forms the problem since it has failed to develop in terms of collective behaviour, especially with regard to modern business corporations.¹³² It is thus worthwhile to take this step and revise the traditional notion

126 Ibid at 43 and 49; Cf also Weigend, *supra* note 18 at 936.

127 Wells, *supra* note 83 at 64.

128 See Ibid at 74 et seq for a detailed discussion from an English law perspective. The aspect of subjectivity of corporations under international law is discussed in Chapter IV.4.

129 S Wolf cited in Pascal, *supra* note 125 at 48.

130 Stoitchkova, *supra* note 13 at 32.

131 Ibid at 30.

132 Cf Punch, *supra* note 89 at 101 et seq.

of (individual) criminal liability.¹³³ This requires returning to the roots of criminal responsibility with its implication of moral blame and from there explore principles of liability suitable for individual as well as collective actors.

Of course, the present study does not intend to deliver a holistic framework for criminal justice theory in general, but focuses on the responsibility of TNCs in international criminal law. Interestingly, international law already is familiar with legal entities as subjects of law. In contrast to (domestic) criminal law it originates from a collectivistic view since it dealt with states as the sole subjects, or agents of atrocities. It was only with the introduction of *criminal* responsibility that individual (non-state) actors became addressees of international obligations.

3. Reconciling the moral guilt contention in international law

To escape the theoretical impasse between individualism and collectivism described above, three solutions are conceivable. Firstly, the guilt requirement can simply not be applied to corporations at all (strict liability). Secondly, the guilt concept can be adapted to the peculiarities of legal entities. A third option would be to hold corporations responsible only *vicariously*, that means to punish them for the offence committed by corporate officials.¹³⁴ However, this indirect way of constructing liability does not solve but only circumvent the problem of moral responsibility on part of corporations. In cases of a direct involvement of corporations in international crimes, like the slave labour cases of *I.G. Farben* or *Krupp* during the Third Reich,¹³⁵ it would lead to the absurd consequence that the firm is punished as ancillary for a crime it is actually responsible for as prime perpetrator. It would thus be inconsistent to build a system of ancillary liability of

¹³³ Likewise Pascal, *supra* note 125 at 44; Weigend, *supra* note 18 at 936 on the other hand is sceptical about the desirability of adapting criminal law concepts to corporations, at least as far as German law is concerned.

¹³⁴ Cf Pascal, *supra* note 125 at 44. Theories of vicarious liability are namely the traditional common law concepts of *respondeat superior*, which attributes the act of any employee within the scope of its employment to the corporation, and the narrower identification doctrine, which attributes (only) the acts of representatives, for they are acting as the “brains” of the corporation (also “directing mind theory”).

¹³⁵ For a discussion of these cases, see Chapter IV.1.

corporations on a foundation of primary liability of individuals. This study focusses instead on a concept allowing for the determination of criteria for holding corporations *directly* responsible for its own wrong.

a. Applicability of the guilt principle

One way of dealing with the notion of guilt in traditional criminal law theory would be to draw the conclusion that it is simply not applicable to non-human entities. Removing the subjective element results in a strict liability approach, which is not unknown to domestic solutions for corporate criminal liability.¹³⁶ Keeping in mind the gravity of international crimes, strict liability also does not appear beyond reason in international criminal law. Zappala considers the principle of *nulla poena sine culpa* inapplicable to the corporate entity by tracing it back to its function of protection for the individual.¹³⁷ As far as human dignity is to be protected by the guilt principle, legal entities, albeit attributed with personality (whether metaphysical, moral, or legal), do unquestionably not hold this kind of dignity. Rather, from the shareholders' perspective, the corporation is no more than property. Moreover, assuming that personal guilt is only required to the extent a conviction expresses moral reprobation, as Hoernle has established,¹³⁸ corporations do not need the protection of the guilt principle unless sanctions actually do imply moral blame on the corporate entity.¹³⁹

The latter consideration leads to the fundamental understanding of the function of criminal law. Cockayne reveals a 'hidden truth of theory' in the need for answering the underlying question "Why do we punish?".¹⁴⁰ The theoretical approach to criminal law in general can be divided in two main approaches, as Cockayne

136 For an in-depth discussion of strict liability from a UK law perspective, see Wells, *supra* note 83 at 67 et seqq.

137 Zappala in note 11 at 972. But at the same time he concedes that the nature of the liability would then not be criminal anymore.

138 T Hoernle cited in Weigend, *supra* note 18 at 940.

139 Ibid with further references. This is also the notion on which the German system of administrative liability ('Ordnungswidrigkeitensystem') is based.

140 J Cockayne in note 11 at 953 et seq.

remarks, either deontological or “consequentialist”. While the deontological understanding draws a moral or ethical system based on the moral intent, under the consequentialist approach, criminal law is merely a means of social regulation.¹⁴¹ Under this utilitarian premise, the focus is on the effects of a social act and turns on criminal punishment as a pragmatic instrument of preventing criminal activities.¹⁴² The notion of just deserts is only of secondary relevance in this regard and also moral blame does not form an essential part. Hence, it is not necessary to apply the guilt principle when strictly following a consequentialist approach to punishment. But does international criminal justice pursue such an attitude?

Firstly, the basic purposes of punishment in international law do not necessarily have to be consistent with the penal objectives of national law.¹⁴³ International criminal law may have been inspired to a large degree, but has never been identical to domestic approaches, and is in particular independent in its development. The ultimate aim of international criminal law is directed towards prevention of the most serious crimes of concern to the international community as a whole.¹⁴⁴ This argues for a strong consequentialist orientation. However, the criminal tribunals have proclaimed a long list of other goals,¹⁴⁵ retribution being one of them and almost equally important as prevention. The conviction of core crimes necessarily involves a strong moral opprobrium. Drawing a comparison to domestic law approaches, strict liability can hence only be relevant with offences of minor wrong, such as regulatory offences. Further, as argued in the second Chapter, the stigma of a criminal conviction is actually the main argument for combating corporate involvement in gross human rights abuses with criminal law. To surrender from imposing moral blame for the “crimes of crimes” is simply inconceivable and blurs the differences of criminal punishment to civil or administrative liability.

¹⁴¹ Ibid at 953.

¹⁴² Cf Damaska in Ibid at 966.

¹⁴³ In Note, *supra* note 85 at 1961 (fn 25) the author in fact finds it dangerous to derive objectives of international criminal law directly from domestic analogues.

¹⁴⁴ Cf para (5) of the Preamble of the Rome Statute; Regarding the International Criminal Tribunals for Yugoslavia and Rwanda (ICTY and ICTR), see Ibid at 1961 with further references.

¹⁴⁵ Ibid at 1969 with further references.

The necessity of moral blame as part of criminal punishment also refutes the notion that the guilt principle is inapplicable to corporations as not possessing dignity. Strict liability dilutes the stigmatising effect of criminal law. As far as core crimes are concerned, a conviction based on strict liability does not reflect the tremendous wrongdoing and will never be an appropriate retaliation. As Stoitchkova concludes, it is neither feasible nor desirable to entirely detach the morality paradigm from legal personality.¹⁴⁶ An appropriate solution must rather be able to reconcile the notion of guilt with the specific characteristics of the corporate entity.

b. Adaptation of the guilt principle

Although the guilt principle is to be applied with regard to corporations, this does not mean that it must be applied in the same way as to individuals. Pascal advocates for a 'more pragmatic version of criminal liability', meaning to loosen from the philosophical notion of a moral agent towards a more flexible approach of 'moral orientation'.¹⁴⁷ Similarly, Stoitchkova holds that culpability and liability may 'well flow from a different set of principles than those applicable to individuals' and advocates for a 'liability theory that takes into account existing differences while acknowledging the uniform applicability of certain moral precepts'.¹⁴⁸ Wells further suggests use more neutral terminology such as 'accountability' with regard to legal entities instead of moral blame and use more functional criteria for the determination of culpability.¹⁴⁹

International law provides for additional justification for adapting the notion of culpability with regard to corporations since the objects and purposes of international law are independent to domestic criminal law. In fact, the individualisation of responsibility was in particular found to be (politically) desirable based on the specific aim of international criminal law to promote peace and security. A perception of collective responsibility between ethnic and religious groups involved

¹⁴⁶ Stoitchkova, supra note 13 at 32 et seq.

¹⁴⁷ Pascal, supra note 125 at 44 et seq., 48.

¹⁴⁸ Stoitchkova, supra note 13 at 33.

¹⁴⁹ Wells, supra note 83 at 81.

in atrocities has been believed to antagonise national reconciliation.¹⁵⁰ For example the president of the ICTY comments on the role of the tribunal:

Far from being a vehicle for revenge, it is a tool for promoting reconciliation and restoring true peace. If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal. ... The history of the region clearly shows that clinging to feelings of "collective responsibility" easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes.¹⁵¹

Making a clear distinction between business corporations, political organisations, and ethnic or religious groups, this objection does not serve as an argument against the criminalisation of corporations. TNCs are in no way perceived as part of the population. The punishment of a firm involved in atrocities is actually likely to promote restorative justice.

Moreover, the notion of individual culpability is unsuitable with regard to the reality of international crimes. Stoitchkova submits that 'the magnitude and complexities of those crimes necessitate accountability avenues that adequately reflect the true character and dynamics of deviance in group settings'.¹⁵² A *teleological* (ie goal-specific) interpretation of the aims of international criminal law,¹⁵³ in combination with the grave nature inherent to all core crimes, demands the creation of effective legal instruments.¹⁵⁴ This is exemplified *de lege lata* by specific legal concepts such as superior responsibility of military commanders and civilian superiors, which has evolved from the needs of coping with hierarchical structures

150 Damaska, *supra* note 86 at 332 with comprehensive reference to cases and materials of the ICTY and the ICTR.

151 President of the ICTY, Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (1994) at 12 (UN Doc. A/49/342).

152 Stoitchkova, *supra* note 13 at 93.

153 Namely the aim of prevention and "fighting impunity" in the first place, but also other goals such as promoting human rights values and peace and security (including stopping an ongoing conflict), cf. Damaska, *supra* note 86 at 331.

154 Cf Andrew Clapham, "Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups" (2008) 6:5 JICJ 899 at 902; Weigend, *supra* note 18 at 940 also refers to authors who regard guilt as only one factor in determining criminal liability, "if the evil to be repressed is serious enough ...".

inherent to systemic crimes.¹⁵⁵ The effectiveness principle (*ut res magis valeat quam pereat*) is well established in the interpretation of treaties.¹⁵⁶ However, it is infeasible to interpret art 25 of the Rome Statute in the way that corporations fall within the *ratione personae* of the ICC. Such an interpretation would be contrary to the wording of the norm, which is prohibited in criminal law (*nullum crimen sine lege scripta et stricta*). Rather the rule of effectiveness is relevant here in the absence of a treaty. Its object and purpose create pressure on the international community to find a legal solution to corporate involvement in international crimes and at the time justifies a legal compromise on the traditional notion of the principle of culpability.

To conclude this Chapter, it can be held with good reasons that the seemingly irreconcilable debate on criminal responsibility of legal entities can be overcome in international law. The actual challenge is the development of a *sui generis* type of corporate guilt.¹⁵⁷ It is worthwhile to examine if precedent of corporate criminal liability can be found already in international law, and thus serve as groundwork for the construction of such a *de lege ferenda* concept.

155 Art 28 Rome Statute.

156 Art 31 Vienna Convention on the Law of Treaties (1969); Cf Malgosia Fitzmaurice, Olufemi A Elias & Panos Merkouris, *The issues of treaty interpretation and the Vienna Convention on the Law of Treaties: 30 years on* (Leiden; Biggleswade: Brill; Extenza Turpin [distributor], 2010) at 155.

157 A *sui generis* concept put forward by Stoitchkova is suggested in Chapter V.1.

IV. The *status quo* of corporate criminal liability in international law

This Chapter undertakes a “stock-taking” of the notion of corporate criminal liability in international law. After starting with the 'birth certificate' of international criminal law,¹⁵⁸ the Nuremberg trials,¹⁵⁹ the discussion revolving around a proposal submitted during the negotiations of the Rome Statute is illustrated and a survey of recent international instruments conducted. Eventually, it is analysed whether today corporate liability exists in international criminal law.

1. Precedent of the Nuremberg trials

Although the tribunals established by the Allied Powers had jurisdiction only over natural persons and therefore no company could be convicted for its involvement in the Nazi crimes, it is instructive for the present study how the judges dealt with the *organisational context* in which the atrocities happened.¹⁶⁰

a. Responsibility of non-state actors

First of all, the fundamental legacy of the Nuremberg trials should be highlighted. Non-state actors for the first time were held responsible for violations of international law. With regard to business involvement in mass crimes, the tribunal rejected the suggestion that international law only attaches to individuals who acted on behalf of the state and 'private industrialists should be given the benefit of the plea of ignorance of the law'.¹⁶¹

¹⁵⁸ Gerhard Werle, *Principles of international criminal law* (The Hague: TMC Asser Press, 2005) at 6.

¹⁵⁹ For a short introduction to the Nuremberg trials, see Chapter II 1.b.

¹⁶⁰ No other international criminal tribunal has addressed the issue of corporate responsibility in this direct way again. See Fauchald & Stigen, *supra* note 9 at 1037 regarding the ICTY and the ICTR.

¹⁶¹ *United States v. Krupp*, IX Trials of War Criminals Before The Nuremberg Military Tribunals (available on <http://www.mazal.org/archive/nmt/09/NMT09-T0001.htm>) at 170.

In this context the IMT stressed that '[c]rimes against international law [were] committed by men, not by abstract entities'.¹⁶² This reasoning has been frequently cited as an authoritative argument against imposing liability on legal persons.¹⁶³ However, the context of this statement reveals that it actually aimed at rejecting the defendant's defence of having acted in an official capacity. It is a fundamental paradigm-shift with a view to international law that not only states are subjects of international law, but also non-state actors. The court stated: 'That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized.' It continued: '[O]nly by punishing individuals who commit such crimes can the provisions of international law be enforced'.¹⁶⁴ The term 'abstract entities' therefore refers to states only. Nothing is said about the status of private legal persons.¹⁶⁵ In fact, having established that non-state actors are subjects of international law, one could argue that it is conceptually only of secondary relevance whether this refers exclusively to natural persons.¹⁶⁶

b. The concept of criminal organisations

The concept of criminal organisations was adopted by the drafters of the Nuremberg Charter to cope with the innumerable civilian collaborators of the criminal regime of Nazi Germany. It considers the organisational context of the crimes committed by individuals on several hierarchical levels and provides for dealing efficiently with a large number of defendants. It also bridges the gap left by

162 Judgement against Goering et al (1946), I 1946 Trial of the Major War Criminals 171 (available on <http://www.mazal.org/archive/imt/01/IMT01-T171.htm>) at 223.

163 See for example Weigend, *supra* note 18 at 927.

164 Judgement against Goering et al, *supra* note 162 at 223.

165 See also the statement of Schabas in note 11 at 964.

166 Volker Nerlich, "Core Crimes and Transnational Business Corporations" (2010) 8 JICJ 895 at 899 with regard to a similar statement of the USMT in Flick et al.

the conspiracy doctrine, which only had a narrow scope of application under the Charter and would have left many second-level perpetrators go unpunished.¹⁶⁷

The mechanism of the concept of criminal organisations was to establish the responsibility of the group or organisation in the first place and subsequently punish the members for the crimes committed by that organisation, but on the basis of individual guilt.¹⁶⁸ This approach reflects the role of the organisation as prime actor. In fact, the prosecutors started with the investigation of the legal persons and the organisations themselves even had lawyers to defend them.¹⁶⁹ Several political or military groups and organisations were declared criminal by the IMT and the national courts and military tribunals relied extensively on this doctrine in the subsequent trials of individuals.¹⁷⁰

However, in terms of precedent for corporate criminal liability this doctrine should not be overstated. Since the tribunals did not have jurisdiction over legal persons, the declaration as criminal organisation did not entail any penalties. And although the implication of a moral verdict can hardly be denied, the purpose and objective behind the concept was merely to facilitate the prosecution of the members of a group or organisation. As an evidentiary rule it served to overcome procedural hurdles of trying the members. This is reflected by the comment of the IMT, which saw no advantage in declaring organisations criminal as long as separate trials of its members were possible.¹⁷¹ Such a reasoning applies in particular to corporations as

167 The Nuremberg Charter only provided for conspiracy in relation to crimes against peace and the concept was applied restrictively by the tribunal. Only government officials of the immediate leadership circle were convicted of conspiracy for waging an aggressive war. Not even firms directly involved in the re-armament of Germany were considered to have the requisite *mens rea*.

168 Art. 9 Charter of the International Military Tribunal at Nuremberg (1945) provides that “[a]t the trial of any individual member of any group or organization the Tribunal may declare ... that the group or organization of which the individual was a member was a criminal organization ... [sic]”. Article 10 continues that “[i]n cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individual to trial for membership therein In any such case the criminal nature of the group or organization is considered proved and shall not be questioned [sic].”

169 Clapham, *supra* note 15 at 164 with further references.

170 *Ibid* at 163; Stoitchkova, *supra* note 13 at 49.

171 Judgement against Goering et al, *supra* note 162 at 276 and 279.

their size generally allows for individual prosecutions.¹⁷² Furthermore, the criminal nature of a company, even if it was directly involved in atrocities, could hardly be established since the *primary* objective inherent to all business is financial profit, not the commission of crimes. At the trials of corporate agents the tribunals did in fact not make use of the concept of criminal organisation with regard to corporations.

c. Responsibility of corporations as such

Industry played an important role in the Third Reich since it enabled the Nazi government to make the secret plan of waging war a reality. A wide range of firms and industrialists kept the German war machinery going by contributing material and financial support. Although no corporate officials were tried as major war criminals before the IMT, prosecution of industrialists took place before the national tribunals established under Control Council Law No 10.¹⁷³ Some of these cases deal extensively with the responsibility of the firms as such. In fact, the judgements give the impression that 'justice was to be served by prosecuting the firm, rather than the individual'.¹⁷⁴

i. The I. G. Farben case

In the case of I.G. Farben¹⁷⁵, held before the USMT, five directors of the firm I.G. Farben were convicted for the use of slave labour. It was the first time that a court held representatives of a business collectively liable. The defendants were accused of having 'used the Farben organization as an instrument by and through which they

172 Stoitchkova, *supra* note 13 at 52.

173 In fact, the Allied Powers considered a separate IMT trial exclusively for the many business actors involved in the Nazi atrocities. This was, however, never held since the economy of Germany soon was supposed to be stabilised in view of the cold war. See, *Ibid* at 51 with further references.

174 Andrew Clapham, "The complexity of international criminal law: Looking beyond individual responsibility to the responsibility of organizations, corporations and states" in Ramesh Thakur, ed, *From sovereign impunity to international accountability - the search for justice in a world of states* (Tokyo New York: United Nations University Press, 2004) at 236.

175 *United States v. Krauch, et. al* (1952), VIII 1952 Trials of the War Criminals Before the Nuremberg Military Tribunals 1 (available on <http://www.mazal.org/archive/nmt/08/NMT08-C001.htm>).

committed the crimes'.¹⁷⁶ This reasoning involved that the tribunal first examined the role of the firm in order to determine the individual guilt of the defendants.¹⁷⁷ The tribunal explicitly considered Farben as a legal entity to have violated international law: 'Where private individuals, *including juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law.'¹⁷⁸

It is stressed again that the accused were convicted as individuals for their contribution to the crimes, not as representatives for corporate activities. The court explains 'that the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. We have used the term "Farben" as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals....'.¹⁷⁹ However, it can be drawn from the reasoning that the tribunal holds corporations capable to violate international law.¹⁸⁰ Moreover, as Clapham notes, the courts accepted the implication that 'the corporation itself committed the war crime and its directors were being convicted for belonging to the organization [*sic*]'.¹⁸¹

The legal basis of this construct can be seen in art 2 (2) (e) CCL No 10. It states that a person is deemed to have committed a crime if he was a member of any organisation or group connected with the commission of such crime. This marks the difference between the concept of criminal organisations applied by the IMT and the reasoning of the USMT in the Farben case. Pursuant to art 9 of the Nuremberg Charter the organisation is declared criminal 'in connection with any act of which the

¹⁷⁶ Ibid at 1108.

¹⁷⁷ Ibid at 1153.

¹⁷⁸ Ibid at 1132 (emphasis added).

¹⁷⁹ Ibid at 1153.

¹⁸⁰ Clapham, *supra* note 17 at 239.

¹⁸¹ Ibid at 238.

individual may be convicted'. In the Farben case the blame was not inferred from the conviction of an individual, but the other way around. The firm itself was found to be connected with the commission of a war crime. Clapham thus rightly interprets the judgement 'as implying that the Farben company itself had committed the relevant war crime, even though the Tribunal had no jurisdiction over Farben as such'.¹⁸²

ii. The Krupp case

In the Krupp case,¹⁸³ Alfried Krupp and other executives of the Krupp firm were convicted for crimes with respect to plunder, spoliation and the use of forced labour. The court describes in detail the role of the firm and the policy of using slave labour to decrease production costs. As in the case of I.G. Farben, the tribunal holds that the Krupp firm had committed a violation of the Hague Regulations by planning, desiring and purposefully seeking forced labour.¹⁸⁴ It elaborates on the role of the company as prime perpetrator by stating that 'the initiative for the acquisition of properties, machines and materials ..., was that of the Krupp firm and that it had utilized the Reich government and Reich agencies whenever necessary to accomplish its purposes ... [*sic*]'.¹⁸⁵ These very clear words express the notion that 'it is the actions of the enterprise rather than individual defendants that appear criminal'.¹⁸⁶

Moreover, the tribunal expressively referred to the intent of the firm and by that established the notion of *mens rea* on part of a legal entity. The court found that 'the Krupp firm had manifested not only its willingness but its ardent desire to employ forced labor [*sic*]'.¹⁸⁷ Ramasastry rightly draws from this way of reasoning that '(1) some criminal acts are the manifestation of planning and execution at the firm level, and (2) courts can attribute liability to the TNC as well as its employees'.¹⁸⁸

182 Clapham, *supra* note 15 at 171; Cf also Stoitchkova, *supra* note 13 at 60.

183 Krupp Case, *supra* note 161.

184 *Ibid* at 1352 et seq.

185 *Ibid* at 1372.

186 Ramasastry, *supra* note 37 at 108.

187 Krupp Case, *supra* note 161 at 1440.

d. Conclusion

The judgements of the Nuremberg trials, especially those dealing with the great industrialists, can be seen not only as a starting point for individual criminal responsibility for business activities,¹⁸⁹ but also provide for the foundations of the liability of TNCs in international law.¹⁹⁰ This conclusion originates less from doctrinal technicalities developed by the courts, but rather it is the acknowledgement of the existence of corporate fault.

The value of the judgements lies in the attempt to directly blame the firms for their criminal conduct in the course of World War II. The cases of I.G. Farben and Krupp established that corporations have obligations under international law. Based on that responsibility, individuals were actually held liable vicariously for the wrongdoing of the firm. In contrast, the analysis of the concept of criminal organisations has shown that it was only a mechanism to overcome evidentiary hurdles in regard to the conviction of the members of these organisation. It does therefore not constitute precedent for the liability of corporations *as such*.

2. **The Rome Statute draft article on corporate liability**

In the course of the negotiations on the Rome Statute, the issue of the ICC's jurisdiction over legal persons was controversial. France submitted a proposal to the Preparatory Committee in 1996 providing for the inclusion of legal persons in the jurisdiction of the ICC.¹⁹¹ States were excluded from the outset and liability limited to private legal persons only. The motive behind this constraint is obvious, as no state would have been willing to defend itself before the new ICC.¹⁹² The main purpose of

188 Cf Ramasastry, *supra* note 37 at 112.

189 The contribution of Jessberger, *supra* note 73 deals extensively with the standards for attributing individual responsibility established by the I.G. Farben trial.

190 Ramasastry, *supra* note 37 at 92.

191 Preparatory Committee on the Establishment of an International Criminal Court, Report (1998) at 49. The proposed art 23 (5) of the draft statute provides that: "The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives."

192 Clapham, *supra* note 15 at 156.

this draft provision was to facilitate restitution and compensation orders, as individual criminals might not have enough assets.¹⁹³ Further, a conviction would attach opprobrium to the corporation, and the deterrent effect of a possible conviction would lead to cautious decision-making and thus prevent crimes. However, the proposal was eventually withdrawn by France when it became clear that there was no possibility for the proposal to be adopted by consensus. A footnote added to the draft provision by the Preparatory Committee comments on the difficulties:

There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed¹⁹⁴

The arguments of the opposing delegations were conceptual difficulties as well as procedural problems.¹⁹⁵ Detraction from the court's jurisdictional focus on the individual was apprehended as well as evidentiary problems. Further, no universally recognised common standards for attribution existed. Some major criminal law systems rejected the notion of corporate criminal liability at all. This fact was in consequence deemed irreconcilable with the principle of complementarity of the ICC.¹⁹⁶

Since it was assumed that the Rome Statute could not oblige states to subject corporations to criminal sanctions at the domestic level, states might inevitably find themselves unable or unwilling to prosecute pursuant to art 17 (1) Rome Statute.¹⁹⁷ The legal consequence would be that the case would always be admissible before the

193 Fauchald & Stigen, *supra* note 9 at 1038 with further references.

194 Preparatory Committee on the Establishment of an International Criminal Court, *supra* note 191 at 49.

195 See Otto Triffterer & Kai Ambos, *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article* (München; Portland, Or.; Baden-Baden: C.H. Beck; Hart; Nomos, 2008) at 746.

196 William Schabas, *The international criminal court: a commentary on the Rome statute* (Oxford; New York: Oxford University Press, 2010) at 426. The principle of complementarity is enshrined in para 10 of the Preamble and art 1 of the Rome Statute. It will be discussed in Chapter V.3.

197 *Ibid* at 425.

ICC. Such a result was regarded as unacceptable since the subsidiarity of the ICC was not only introduced for pragmatic reasons, but in the first place intended to safeguard the sovereignty of the states and therefore not subject to compromise.

The legacy of the Nuremberg trials was interestingly utilised by both parties. While the proponents contended that the exclusion of legal persons 'would be a step back in the light of Nuremberg and subsequent trials', others held the proposal as 'immature or infeasible' with regard to discussions surrounding the Nuremberg precedent and the lack of international law and practice.¹⁹⁸

The failed proposal of France illustrates the disagreement prevailing in the international community on the matter of criminal liability of legal persons. However, it is important to note that no delegation challenged the fundamental assumption established at Nuremberg that legal persons are bound by international criminal law. As Clapham points out, rather '[t]he disagreements arose over the complexities involved in international trial of a non-natural person: *How* to serve the indictment, *who* would represent the interests of the legal person, *how much* intention needed to be proved, *how* to ensure that natural persons could not hide behind group responsibility.'¹⁹⁹ Furthermore, the legal entities the delegates had in mind were less private business corporations but rather quasi-public entities and non-governmental associations.²⁰⁰ In the context of the difficult negotiations on the creation of a whole new court, it becomes obvious that the idea of extending the jurisdiction to legal persons was not ripe at this stage.

3. Recent developments in international law

Since the unsuccessful attempt to extend the jurisdiction of the ICC to legal persons, more than fifteen years of development in international law passed by. The fact that the draft was not raised again at the recent Review Conference of the Rome Statute in Kampala does not mean that the trend towards corporate accountability came to a

¹⁹⁸ Stoitchkova, *supra* note 13 at 15.

¹⁹⁹ Clapham, *supra* note 15 at 191.

²⁰⁰ *Ibid.*

halt. A variety of international instruments on criminal law introduced by international organisations attend to this topic. None of these conventions are concerned with international core crimes. However, it is well possible that the *status quo* of the Rome Statute has been overtaken by the recent developments and a concept of corporate criminal liability in international law has emerged in the shadow of the ICC.

a. European instruments on criminal law

Several criminal law instruments of the European Union (EU) and the Council of Europe deal with the liability of corporations in different fields, such as financial and environmental crimes, as well as sexual abuse of children.²⁰¹ A convention clearly setting an example regarding the regulation of corporate liability is the “Second Protocol to the European Convention on the protection of the European Communities' financial interests”.²⁰² This instrument aims at, *inter alia*, introducing fraud against EU budget funds as a crime. The concept designed in this convention has not only been adopted in subsequent conventions on corporate liability, but has been copied or paraphrased in European as well as international conventions.²⁰³

Since the legislative competence of the EU comprises criminal law only to a limited degree²⁰⁴ and most Member States do not provide for corporate criminal liability, the provisions on corporate liability are carefully worded. States are (only) required to 'take the necessary measures to ensure that a legal person ... is punishable

201 For an overview, see Swart in note 11 at 948.

202 Second protocol to the European Convention on the protection of the European Communities' financial interests (1997). This convention is going to be enacted as a directive in the near future, cf. Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests (2001).

203 Cf Swart in note 11 at 949.

204 The EU can only act within the powers conferred on it pursuant to art. 5 (1) Treaty on European Union (Consolidated version) (2012) (TEU). A legislative competence to regulate on judicial cooperation in criminal matters can be found in art 82, 83 Treaty on the Functioning of the European Union (Consolidated version) (2012) (TFEU). Apart from that, only art. 325 (4) TFEU provides for a special legislative authorisation. It is limited, however, to measures warranting an effective and equivalent protection in all Member States against fraud affecting the financial interests of the EU.

by *effective, proportionate and dissuasive sanctions*, which shall include *criminal or non-criminal* fines and may include other sanctions.²⁰⁵

The term “criminal liability” is not mentioned in regard to corporations.²⁰⁶ Beyond the non-reparatory element, the determination of the legal nature of liability is left open to the member states. As they are free to limit sanctions to non-criminal penalties, eg administrative fines, it is doubtful whether one can say that a general concept of corporate criminal liability embraces at the international level.²⁰⁷ Although the European Commission has answered this question in the affirmative in a draft protocol,²⁰⁸ the states are in no way obliged by the conventions to introduce criminal provisions for corporations. States opposing the idea of corporate criminal liability, such as Germany, Spain, Italy, and Portugal, may as well fit the provisions into their legal system of administrative sanctions.

European instruments may thus reflect the global trend towards corporate accountability. They do not, however, establish criminal liability for corporations on the international level.²⁰⁹

b. International conventions

The pattern of European instruments has consequently been adopted in several conventions. The Organisation for Economic Co-operation and Development (OECD) concluded the Anti-Bribery Convention,²¹⁰ followed by three instruments of the United Nations (UN) promoting corporate responsibility in the fields of

205 Art 4 of the Second protocol to the European Convention on the protection of the European Communities' financial interests.

206 It should be noted here that the wording in more recent legal instruments apparently assumes the existence of corporate criminal liability in national law. Directive 2008/99/EC eg does not mention non-criminal sanctions for legal persons (art 7). Only by conversion to art 5 (penalties in general) it becomes clear that criminal penalties are not obligatory.

207 Cf the statement of Swart in note 11 at 949.

208 See G J M Christens & Jean Parade, *European criminal law* (The Hague; New York: Kludger Law International, 2002) at 457 with further references.

209 Also Ibid footnote 105.

210 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).

terrorism, transnational organised crime, and anti-corruption.²¹¹ Further, two recently concluded conventions, the Anti-Counterfeiting Trade Agreement (ACTA)²¹² and the World Health Organisation (WHO) Draft protocol to the 2003 Framework Convention on Tobacco Control (2012),²¹³ shall be mentioned to show that the formulation brought into being by the EU can be described as today's standard phrase on corporate liability in international law.

The dissent of the international community in terms of corporate criminal liability is expressly reflected in these conventions. States are obliged to take the necessary measures to establish the liability of legal persons, but only 'in accordance with its legal principles'.²¹⁴ The legal nature of this liability is left to the sole discretion of the states, as long as sanctions are effective, proportionate and dissuasive. The OECD substantiates the meaning of this formula in its Good Practice Guidance, but does not recommend a specific form of liability.²¹⁵

c. Conclusion

A striking uniformity emerged in the phrasing of provisions on the liability of legal persons in international legal instruments. Their wording confirms the picture drawn above regarding European instruments. Corporate criminal responsibility was clearly set on the agenda, however, the states' obligation to hold corporations accountable remains subject to the traditions and legal system of domestic law. Since the failed attempt to extend the jurisdiction of the ICC, practice in international law did not develop towards accepting the notion of corporate criminal liability, but rather to a consolidation of the objections. International law today is marked by

211 UN International Convention for the Suppression of the Financing of Terrorism (1999), UN Convention against Transnational Organized Crime (2000), and UN Convention against Corruption (UNCAC) (2003).

212 Article 23 (5).

213 Article 14 (1) Draft Protocol to Eliminate Illicit Trade in Tobacco Products (2012), FCTC/COP/5/6.

214 Cf. Art. 2 of the OECD Anti-Bribery Convention.

215 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009), Annex I.

disagreement and an independent concept of corporate criminal liability in international law has not been established by the instruments discussed.²¹⁶ Quite contrary, it is the degree of recognition in domestic jurisdictions that determines the *status quo* on the international level. A focus on domestic tendencies is thus directly relevant for the recognition of a genuine international concept.

4. Does corporate liability exist today in international criminal law?

The preceding sections have shown that neither international conventions nor judicial decisions have established the notion of criminal liability of corporations. However international law is not created exclusively by treaties, but can also develop by state practice as customary law.²¹⁷ A rule of substantive international law providing for the punishment of corporations might have been established in the form of 'international custom, as evidence of a general practice accepted as law'.²¹⁸ The existence of customary law would allow a tribunal authorised to exercise jurisdiction over legal persons in the future to apply this norm without facing the objection of retroactivity (*nullum crimen sine lege*).²¹⁹ The recognition of custom presupposes not only 'a constant and uniform usage' by states (*usus*), but also the conviction that the conduct is legally obligatory (*opinio juris sive necessitatis*).²²⁰ Furthermore, the binding nature of customary international law is relative in the

216 The conclusion drawn by Clapham, *supra* note 15 at 178 that "the international legal order has already adapted to define corporate crimes in international law and to oblige States to criminalize this behaviour [sic]" goes to far. He neglects the important fact that the definition of the nature of liability is left open to the states.

217 Art 38 para 1 of the Statute of the International Court of Justice (ICJ Statute) is traditionally taken to provide a definitive enumeration of sources of international law. International conventions, international custom, and general principles are listed as well as judicial decisions and teaching of the most highly qualified publicists. The latter two are to be interpreted less as a source of international law than a source of evidence for proving the law.

218 Art 38 para 1 (b) ICJ Statute.

219 Nerlich, *supra* note 166 at 898.

220 Colombian-Peruvian asylum case, Judgement of November 20 1950, ICJ Reports 1950, at 276; cf also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, 226 et seqq.

sense that initially only the states practising the conduct are bound until an all-encompassing international norm may emerge.

Three reference points must be differentiated when examining corporate criminal responsibility under international custom.²²¹ In a first step the fundamental question is whether corporations are bound by the prohibitions underlying international core crimes ('*Verbotnorm*'). The second issue is whether a contravention actually entails criminal punishment ('*Sanktionsnorm*'). Only in a third step, a court's jurisdiction to prosecute legal persons is of relevance.²²²

The applicability of a *Verbotnorm* to corporations touches the question of whether they have an international legal personality, ie are a subject of international law.²²³ The Nuremberg judgements have already indicated that business firms are capable of violating international law. Far more difficult is thus the second aspect, as a *Verbotnorm* is often grounded in international customary law.²²⁴

a. Obligations of corporations under international law

In regard to core crimes, the prohibition does not necessarily have to flow from international criminal law, but can be rooted in all fields of international law. Nerlich takes the example of war crimes, where the prohibited conduct is predominantly contained in international humanitarian law.²²⁵ However, the answer to the question whether corporations are bound by these norms is not as easy as the Nuremberg precedence may suggest. As explained above, international law in the first place deals with states. Non-state actors have been attributed with legal personality only to a limited extent. With regard to corporations, Cassese observes that 'states have not upgraded these entities to international subjects proper' and submits that

221 Geneuss et al, supra note 5 at 967; similarly Nerlich, supra note 166 at 898.

222 The extension of the jurisdiction of the ICC to legal persons will be discussed in Chapter V.

223 Schwarzenberger, cited in Fauchald & Stigen, supra note 9 at 1029 (fn 7), defines: "International personality means capacity to be a bearer of rights and duties under international law".

224 Werle, supra note 158 at marg. 960.

225 Nerlich, supra note 166 at 898.

'multinational corporations possess no international rights and duties: they are only subjects of municipal and "transnational law".'²²⁶

For the present purpose, the legal personality of corporations in international law does not have to be established in its entirety and also the counter-argument of Cassese not challenged completely. It is sufficient to assert that corporations do have limited legal personality regarding the prohibition of human rights violations amounting to international crimes. This can be based on two preliminary considerations on the structural differences of international criminal law, submitted by van den Herik and Cernic: Firstly, imposing obligations on corporations 'does not require a paradigm shift' in international criminal law.²²⁷ In contrast to human rights law, the primary duty-holders of international criminal law have always been individual non-state actors.²²⁸ It is conceptually only of secondary relevance whether liability of *individuals* includes exclusively natural persons, or also legal persons.²²⁹ Secondly, the prohibition of the core international crimes, namely genocide, crimes against humanity, war crimes, and the crime of aggression, are norms of *ius cogens*.²³⁰ These norms are defined in the Vienna Convention on the Law of Treaties as 'peremptory norms of general international law from which no derogation is permitted',²³¹ and thus exist beyond any state practice.

That legal persons are subject to these international obligations can be established with reference to the field of human rights law, from which these obligations originate. Legal persons are already treated equally as natural persons when it comes to enjoying rights under human rights law.²³² For example, corporations are vested

226 Cassese cited in Clapham, *supra* note 15 at 190.

227 Van den Herik & Cernic, *supra* note 10 at 742.

228 In contrast, the notion of "Crimes of states" was dismissed from the outset for political reasons, Cassese in note 11 at 969.

229 Nerlich, *supra* note 166 at 899 with regard to the USMT in Flick et al establishing that non-state actors are responsible under international criminal law.

230 Cf van den Herik & Cernic, *supra* note 10 at 742.

231 Art 50 of the Vienna Convention on the Law of Treaties (1966).

232 Slye, *supra* note 24 at 958.

with rights under European human rights law and have *locus standi* before the European Court for Human Rights (ECHR).²³³ Conversely, corporations must also be regarded as duty-holders for the underlying prohibition of international crimes.²³⁴ Considering the object and purpose of human rights law it would simply 'be illogical to grant corporations rights under international law, including international human rights law, while simultaneously allowing them to avoid responsibility for the most egregious violations of the same body of law'.²³⁵ Further, the international regulation of corporate behaviour reflects the state's recognition that legal persons are addressees of international law.²³⁶ The fact that most treaties call upon states parties to implement and enforce these rules is irrelevant in this regard. As Stephens comments, '[t]he lack of international enforcement and the need for national action, however, should not be mistaken for the absence of an international norm'.²³⁷

b. Transgressions entailing criminal responsibility under customary law

The common approach to leave enforcement of international instruments open for states poses a great difficulty for identifying a norm in international customary law entailing criminal punishment for the violation of the underlying prohibition of core international crimes. However, it has been submitted that the state practice and *opinio juris* necessary to establish custom can be observed in regard to the predominant acceptance of (domestic) corporate criminal liability.²³⁸

From a global perspective, the majority of states apparently recognise the notion of corporate criminal liability.²³⁹ Especially in Western Europe civil law tradition, the

233 Art 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11 (1952) for example expressly assigns the protection of property to natural *and* legal persons. In *Agrotexim v Greece*, A330-A (1995), the ECHR established that in principle the corporation, not its shareholders, are victims of expropriation.

234 Cf Clapham, *supra* note 15 at 190.

235 Slye, *supra* note 24 at 959.

236 For a survey of international legal instruments dealing with corporate liability, see Chapter IV.3.

237 Stephens, *supra* note 3 at 70.

238 Eric Engle, *supra* note 63 at 295 et seq.

few resisting states turn in at fast pace.²⁴⁰ The recommendation of the Council of Europe in 1988 to provide for criminal and sanctions of enterprises in national law has come to fruition.²⁴¹ Not only France, which decisively shaped the individual focus of criminal law during the French revolution,²⁴² has reclaimed collective responsibility,²⁴³ but also other countries like, *inter alia*, the Netherlands,²⁴⁴ Switzerland,²⁴⁵ Belgium, Norway, and Austria have established criminal responsibility of legal entities.²⁴⁶

Considering this almost universal recognition, a constant usage seems obvious. But, as mentioned above in Chapter II, a comparative survey requires the consideration of certain restraints. Most obviously the classification of legal systems in common law and civil law systems hold fundamental differences. Referring to England, Wells warns that one should not 'assume that it is possible to pull out one section of a criminal code and compare it with another jurisdiction on the assumption that everything else in the way of legal institutional and cultural arrangements will remain conveniently static'.²⁴⁷ Most corporate liability provisions in England for example are found in the regulatory field and are thus rather comparable with

239 Fauchald & Stigen, *supra* note 9 at 1040 with further references; cf also Anita Ramasastry, Robert C Thompson & New Security Programme, Commerce, crime and conflict: legal remedies for private sector liability for grave breaches of international law: a survey of sixteen countries: executive summary (Oslo: Fafo, 2006).

240 Even in Germany, a strong opponent for traditional legal reasons, demands for a pragmatic instrument to hold companies accountable for financial and economic crimes come to fruition. The Minister of Justice of the federal State of Nordrhein-Westfalen has announced a legislative initiative for early 2013 to end the "island status" of Germany in Europe regarding the rejection of corporate criminal liability (cf. <http://www.spiegel.de/spiegel/vorab/nrw-justizminister-kutschatj-fordert-unternehmensschliessungen-a-850760.html>).

241 Art I (3) (b) Recommendation No. R (88) 18.

242 For a thorough look on the beginnings of corporate sanctioning see Stessens, *supra* note 17 at 494.

243 Art 121-2 Code Pénal.

244 Art 51 Wetboek van Strafrecht.

245 Art 102 Strafgesetzbuch.

246 Weigend, *supra* note 18 at 928; Ramasastry, Thompson & New Security Programme, *supra* note 239.

247 Wells, *supra* note 83 at 129.

administrative regulation in civil law systems.²⁴⁸ Strong opponents of corporate criminal liability like Germany have put in place an administrative system capable of imposing sanctions on corporations with a similar effect.²⁴⁹ Wells draws the conclusion that '[i]n all systems there is a mix and we should not conceive of them as separate, unrelated alternatives'.²⁵⁰

A more suitable point of reference for examining customary law is therefore domestic regulation regarding violations of human rights norms amounting to international crimes. In fact, several states apply incorporated provisions of the Rome Statute to legal persons although they are not obliged to this by international law.²⁵¹ Some of these states have done so even though their legal system rejects the notion in principle.²⁵² This state practice might arguably serve as an authoritative source for establishing both a constant and uniform usage as well as *opinio juris*.

However, apart from the subject matter of regulation the attribution of liability to legal persons does not follow a uniform standard.²⁵³ The International Commission of Jurists observes that 'in some jurisdictions, the business can be held criminally liable for the acts of its employees, in others a business is directly accountable for the acts of the senior management', and a third approach emerges 'which focuses on the culture within the business, and the way in which the business is run'.²⁵⁴ Further, with

248 Ibid at 128.

249 Sec 30 of the German *Ordnungswidrigkeitengesetz* (Administrative Offences Act).

250 Wells, *supra* note 83 at 129.

251 The common law countries Australia, Canada and United Kingdom as well as the civil law countries Belgium and Netherlands apply genocide, crimes against humanity, and war crimes to legal persons. France and Norway as well as India, USA, and Japan do so too, but have incorporated core crimes only in part. For an overview, see the survey of Ramasastry, Thompson & New Security Programme, *supra* note 239 at 30.

252 Argentina and Indonesia in principle reject criminal liability of legal persons, but have ignored conceptual issues and adopted statutes providing for corporate criminal liability in terms of specific international crimes (such as environmental and commercial crimes, corruption and terrorism).

253 For an overview of the different attribution standards in USA and selected Western European countries, see the comparative analysis of Safwat & Beale, *supra* note 71 at 163, concluding that "[t]here is no European consensus on the standard for corporate liability".

254 International Commission of Jurists, *supra* note 103 at 58.

a view to the specific intent requirement of genocide, the common law concept of corporate liability does not necessarily cover *mens rea* offences.²⁵⁵

Lastly, the disagreement on the international level puts the necessary *opinio juris* in question. No international tribunal has been vested with jurisdiction over legal persons, which 'indicates that a sufficiently strong consensus among states for such responsibility in international law is lacking'.²⁵⁶ Moreover, the discussion at the negotiations to the Rome Statute as well as the common practice in international instruments to leave a definition of the nature of liability open clearly reflects that the states do not see the notion as being ripe for international law.

The rejection of *opinio juris* is also supported by the finding of a USA domestic court applying international law. The Court of Appeals held in *Kiobel v Royal Dutch Petroleum* that 'corporate liability is not a discernable – much less universally recognized – norm of customary international law that we may apply pursuant to the ATS [*sic*]', '[b]ecause customary international law consists of only those norms that are specific, universal, and obligatory in the relations of States *inter se*, and because no corporation has ever been subject to any form of liability (whether civil or criminal) under the customary international law of human rights'.²⁵⁷

The predominant recognition of criminal liability of legal entities in domestic law can therefore not in itself prove customary international law. Overall, a regulation by treaty is for the time being required to punish corporations for grave violations of human rights norms amounting to international crimes.

²⁵⁵ Murphy in note 11 at 976.

²⁵⁶ Fauchald & Stigen, *supra* note 9 at 1041 bringing further evidence by citing quotations the Special Rapporteur of the ILC and the UN Secretary General's special representative for business and human rights.

²⁵⁷ 621 F.3d 111 (2d Cir. 2010), at 24 et seq. A petition for review of this decision has been granted by the Supreme Court. Reargument of the case occurred in October 2012.

V. Implementing corporate criminal liability into the Rome Statute

The result of this study is that criminal liability of private legal persons is not part of international law until the present day. Thus, leeway is existent regarding the questions how a *de lege ferenda* international regulation may be constructed and how an effective enforcement can be warranted. A manifest and intensively discussed way of implementing the notion of criminal responsibility of corporations is to extend the jurisdiction of the ICC. As already mentioned in the introduction, the issue of liability of legal persons was not broached at the Rome Statute Review Conference at Kampala in 2010. However, the Rome Statute can be amended at any time with a two-thirds majority of states parties according to arts 121, 123 of the Rome Statute. The blocking period of eight years has expired in 2009.

Apart from this option, it has been submitted that a new specialised tribunal could be created.²⁵⁸ However, this route is obviously not a more viable alternative to an amendment of the Rome Statute. Creating a whole new substantial and procedural legal framework is a complicated endeavour, let alone the efforts needed to put this treaty into practice. The consent required would exceed the volition needed to extend the jurisdiction of the ICC in many ways. Hence, if no consent can be found for an amendment of the Rome Statute, *a fortiori* no new international tribunal will be created.

An amendment of the Rome Statute would involve some substantial changes. Solely the extension of jurisdiction of the ICC to legal persons by amending art. 25 (1) Rome Statute does not suffice. Stoitchkova observes that the 'current Rome Statute framework is not tailored for application to non-natural persons' and '[n]either does it appear suitable ... to corporations *per se*'.²⁵⁹ On the other hand, it is not

258 Jordan Sundell, "Ill-Gotten Gains: The Case for International Corporate Criminal Liability" 20:2 MinnJInt'l L 648 at 678.

259 Stoitchkova, *supra* note 13 at 108.

necessary to create a separate system since the Rome Statute framework 'provides sufficient room for manoeuvre'.²⁶⁰

An essential element of regulation is the definition of what constitutes a criminal act on part of the corporation, ie under which circumstances acts of natural persons can be attributed to the corporate entity. Further, sanctions suitable to legal persons have to be implemented. In this regard, it is important to specify whether a preventive (compliance) system within the corporation can lead to the mitigation of punishment in the case of criminal acts of employees. Ultimately, procedural issues revolving around the complementarity principle of the ICC remain to be solved. These questions require extensive substantial analysis, which this contribution cannot cover exhaustively.²⁶¹ The scope here is therefore restricted to outlining major challenges and suggesting possible options regarding a regulation in the Rome Statute framework.

1. Different concepts of corporate liability

The structure and method of an international regulation providing for the criminal responsibility of legal persons is still open to development. This concerns in the first place the issue of attributing a criminal act carried out by a natural person to the legal entity. Further, regarding the standard of liability, ie the requisite “mental” element of a corporation, we are, as Clapham notes, unlikely to see an unambiguous international standard develop as long as no international court is able to exercise criminal jurisdiction over legal entities.²⁶² Apart from the numerous international instruments mentioned in the foregoing Chapter, pioneering national efforts to hold corporations criminally accountable for international crimes as well as the unsuccessful proposal for the Rome Statute are influential for the method of attributing liability to the corporate entity.²⁶³

²⁶⁰ Ibid at 138.

²⁶¹ See, the comprehensive study of Stoitchkova, Ibid at 95 et seqq (Chapter 5 “The Criminal Liability of Corporations within the Rome Statute Framework”).

²⁶² Clapham, supra note 154 at 918 et seq.

A detailed exploration of the various legal approaches to construct the liability of legal persons would go beyond of the scope of this study and does not add value in terms of international law.²⁶⁴ It may be suggested though that a concept of attribution already seems to have emerged in international law. The advanced version of the French proposal to the Rome Convention discussed above follows an *indirect* approach. Liability is imposed on the legal person if the natural person who has committed a criminal act 'was in a *position of control* within the juridical person' and was 'acting on behalf and with the explicit consent of that juridical person and in the course of its activities'.²⁶⁵ Most importantly, the provision presupposes the conviction of that natural person before a legal entity can be held liable.

A concept of indirect liability based on acts of the key personnel representing the corporation appears to be also leading in international instruments.²⁶⁶ The UNCAC requires states parties to hold legal persons liable for corruptive criminal offences by a natural person 'who has a *leading position* within the legal person', based on the formal position (power of representation) or de facto powers (authority to take decisions or exercise control).²⁶⁷ The same test marks the standard in European regulation, such as the Second Protocol to the European Convention on the protection of the European Communities' financial interests.²⁶⁸ The Implementation Guide of the OECD Anti-Bribery Convention recommends similar approaches, either

263 For a detailed examination of the approach followed in the French proposal to the Rome Conference, see Clapham, *supra* note 15 at 150; Relevant domestic regulation is discussed in Joanna Kyriakakis, "Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code" (2007) 5:4 JICJ 809; and W Cory Wanless, "Corporate Liability for International Crimes under Canada's Crimes Against Humanity and War Crimes Act" (2009) 7:1 JICJ 201.

264 Slye, *supra* note 24 at 964 et seqq gives an overview of the different approaches; For a detailed discussion, see Wells, *supra* note 83 at 146 (Chapter 8 "The Responsible Corporation").

265 UN Doc. A/Conf.183/C.1/WGGP/L.5/Rev.2; Cf also Clapham, *supra* note 174 at 245 with further references.

266 See also the survey of international instruments in Chapter IV.3.

267 Art 18 (1) UNCAC.

268 Art 3; cf also Clapham, *supra* note 15 at 177 with further references.

based on the high level managerial authority of the natural person, or a flexible level of authority reflecting the wide variety of decision-making.²⁶⁹

Without undertaking an assessment of the variety of possible concepts of attribution it may be asserted with reference to the findings of Chapter III that indirect (derivative) liability is unsuitable for determining genuine fault on the part of the corporation. Vicarious approaches 'refute the separate existence of corporations and hence ascribe to them a derivative form of liability which is necessarily vicarious in character'.²⁷⁰ Further, the requisite conviction of a natural person in part undermines the incentives for introducing corporate criminal liability as discussed in Chapter II. In particular the *modus operandi* of collective criminal endeavours based on division of labour and multi-layered responsibility renders the attribution of fault to individuals difficult in practice.²⁷¹ The principle of effectiveness requires that a concept of corporate liability provides especially for cases in which an individual cannot be held responsible. The relationship between individual and corporate liability has been described above as cumulative,²⁷² but not in the sense that one takes precedence over the other. Since different connecting factors are concerned (individual fault as opposed corporate fault), the two routes of responsibility are rightly seen to run *parallel* to each other.

An alternative concept capable of determining genuine corporate fault may therefore be highlighted here. Stoitchkova puts forward a *sui generis* concept of direct corporate criminal liability, based on the theory of 'constructive corporate fault'.²⁷³ This approach recognises the distinct existence of legal entities and applies an objective test of reasonableness to delineate culpable conduct on part of the corporation from isolated individual misconduct of employees.²⁷⁴ Further, the

269 Annex I, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, B).

270 Stoitchkova, *supra* note 13 at 111.

271 Cf *Ibid* at 112.

272 See Chapter II.4.a

273 Stoitchkova, *supra* note 13 at 118 et seqq referring to W S Laufer.

274 *Ibid* at 119.

approach provides for a corporate mental element which is identified by drawing upon organisational characteristics (such as policies, culture, and structures) 'or practices which (...) appear to expressly or implicitly authorise, encourage or otherwise support the violation of the law'.²⁷⁵ This method has the advantage that it allows for the differentiation between the mental states provided for in art 30 of the Rome Statute.²⁷⁶ It therefore comprises indirect as well as direct involvement of corporations in international crimes.

A similar concept has already been introduced in Australian domestic law, providing for the liability of legal persons in regard to international core crimes.²⁷⁷ This progressive approach factors in the term '*corporate culture*', meaning 'an attitude, policy, rule, course of conduct or practice existing within the body corporate ...!',²⁷⁸ to prove that the corporation tolerated, directed, or encouraged criminal transgressions.

2. Restraints of effective prosecution

Chapter II asserted that an effective enforcement can only be warranted by an international court. The reason for this presumption does not only lie in the suspected power imbalance between host-states and TNCs.²⁷⁹ According to Sundell there are convincing arguments that prove international proceedings against multinationals preferable to domestic courts.²⁸⁰ Firstly, not only volatile states but in general 'few states have both the clout and proclivity to take up major corporate human rights

²⁷⁵ Ibid.

²⁷⁶ Ibid at 138. It is thus not confined to a negligence-standard such as other collectivistic approaches focussing solely on the failure to prevent criminal conduct of employees.

²⁷⁷ See, Kyriakakis, *supra* note 263.

²⁷⁸ Sec 12.3 (2) (c) and (d), (4), and (6) of the Australian Criminal Code.

²⁷⁹ See, Chapter II.1.; Apart from the risk of corruption and undue influence, Sundell, *supra* note 258 at 660 also illustrates the opposite effect that states may not yield to powerful corporations, but "victimize corporations through unfair, politicized laws".

²⁸⁰ Ibid at 659 et seqq, 670 et seqq.

offenses [*sic*].²⁸¹ Also Western European countries have retracted from efforts to hold corporate offenders liable for human rights abuses. For example Belgium, a state applying the core crime provisions to legal persons, in view of political pressure of the USA repealed a law granting domestic courts universal jurisdiction.²⁸² Further, the advantages of domestic prosecution of human rights abuses are not of great relevance in the context of corporate wrongdoing (in contrast to state injustice). The benefits listed by Sundell, namely the promotion of political legitimacy and demonstration of capacity as well as advancing the local legal system and reinforcing the rule of law, are important rather in the context of transitional justice.²⁸³

Moreover, international tribunals, in particular the ICC, feature some unique advantages. International institutions enjoy a global backing and the possibility of unfair politically driven proceedings is minimal.²⁸⁴ Procedural problems concerning jurisdictional issues and access to evidence as well as the enforcement of judgements are less of concern in international proceedings.²⁸⁵ States parties to the treaty creating an international tribunal are in principle obliged to cooperate and give effect to the tribunal's judgements. Due to the international recognition, third parties are also likely to be more supportive.

Lastly, the weaknesses of international courts, namely the alleged distance from the criminal events and its victims as well as the perceived stigma of victor's justice, appear less severe with regard to proceedings against private corporations.²⁸⁶ In contrast to the trial of state actors or members of rebel groups, the preventive message of a conviction of TNCs is in the first place addressed to other corporations and less to local people. The firms involved in crime are mostly of Western background and are not perceived as part of the local population.

281 Ibid at 670 et seq.

282 See, HRW, "Belgium: Universal Jurisdiction Law Repealed", 2 August 2012, <<http://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed>>.

283 Cf Sundell, *supra* note 258 at 659 et seq.

284 Ibid at 660 et seq.

285 Ibid at 661.

286 Ibid at 671 et seq.

However, it is neither feasible nor was it ever intended that all breaches of international criminal law would be adjudicated before the ICC. The court does not have the capacity or resources to do so and the state parties to the Rome Statute did not want to completely cede their sovereignty to the ICC in terms of jurisdiction over international crimes. It marks a founding principle of the Rome Statute that the ICC 'shall be complementary to national criminal jurisdictions'.²⁸⁷ The prosecutorial strategy of the ICC is limited to only 'select for prosecution those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes'.²⁸⁸

Indeed, domestic courts are in practice the most important *fori* to enforce international criminal law. With view to the enforcement gap at the domestic level giving cause to the need for international regulation, one might observe a vicious circle. But the extension of the ICC to legal persons might serve as an incentive for states to fill the gap themselves.²⁸⁹ Kyriakakis rightly concludes that '[t]he inclusion of private corporations in the ICC's jurisdiction could function both as a compulsion to reticent states to act in relation to the problem of multinational corporate involvement in international crime, as well as provide a safety net where none will do so'.²⁹⁰

3. The Complementarity contention

The complementarity regime of the ICC was raised as an objection against including legal persons in the jurisdiction of the ICC.²⁹¹ Art 17 Rome Statute gave rise to the concern of some states that the rejection of subjecting legal persons to criminal punishment on the domestic level could be interpreted as 'unwillingness or inability' to prosecute, which would trigger the admissibility of a case before the

²⁸⁷ Art 1 of the Rome Statute.

²⁸⁸ Office of the Prosecutor, Prosecutorial Strategy 2009 – 2012 (2010), at 6.

²⁸⁹ Cf van den Herik & Cernic, *supra* note 10 at 741.

²⁹⁰ Joanna Kyriakakis, "Corporations and the International Criminal Court: the Complementarity Objection Stripped Bare" (2007) 19:1 CrimLF 115 at 150.

²⁹¹ For the discussion revolving around the proposal, see Chapter IV.2.

ICC. Before going into a detailed discussion of the problem, it has to be stressed here that the practical importance of the complementarity objection diminishes with the on-going development towards corporate accountability in domestic legal systems. It only applies to the few states not accepting the notion of corporate criminal liability.

In a thorough examination by Kyriakakis, the complementarity contention has been interpreted to involve a twofold dimension. Firstly, as reflected by the text of the Rome Statute, the operability of the complementarity regime of the ICC could be affected if states are unable to exercise jurisdiction on the basis of a lack of legislative competence ('textual integrity').²⁹² Secondly, from an interpretative view, especially states rejecting the implementation of corporate criminal liability for conceptual or legal-philosophical reasons are concerned of a 'discriminatory impact'.²⁹³

In regard to the problem of textual integrity of the Rome Statute, Kyriakakis concludes that 'stripped bare' the complementarity argument poses no legal obstacle to extending the jurisdiction of the ICC, 'aside from reminding decision makers of the overarching interests they must balance: effective criminal justice and an end to impunity, with a preference for a state based system'.²⁹⁴ This result can be based on a strict interpretation of the wording of art 17 (1) Rome Statute. The norm can be seen as simply not applicable to cases of corporations registered in states which not providing for the criminal responsibility of legal persons. Since those states have not 'seized itself of the matter' they are precluded from challenging the admissibility of the case before the ICC.²⁹⁵ In fact, the admissibility question solved by art 17 Rome Statute presupposes a dispute on concurring jurisdictions between the ICC and a national state.

However, as a second aspect there is still the underlying discriminatory impact on states consciously refusing to follow the ICC in exercising jurisdiction over legal

²⁹² Kyriakakis, *supra* note 290 at 122.

²⁹³ *Ibid* at 136.

²⁹⁴ *Ibid* at 151.

²⁹⁵ Morten Bergsmo, cited in *Ibid* at 126.

persons with reference to peculiarities in the domestic legal system. Kyriakakis translates the complementarity objection under this view as a 'concern that such a discriminatory effect undermines the sovereign right of the state to first go at the prosecution ... and therefore perverts the principle of a "complementary" rather than a "supplanting" permanent court'.²⁹⁶ However, such a claim is based on a "perverted" understanding of the term complementarity itself. The principle of complementarity is correctly described as 'an attempt at reconciling two competing interests, i.e. national sovereignty with the goals of international criminal justice'.²⁹⁷ A balance of these interests presupposes that sovereignty does not prevail under any circumstances, but is subject to the needs of international criminal law. Regarding the regulatory gap demonstrated in Chapter II, an intervention of international criminal law is indeed required to punish and prevent corporate involvement in gross human rights abuses. The aim of ending impunity by filling the regulatory gap existing under national law prevails over the (conditional) priority of domestic jurisdictions.²⁹⁸

It is further important to emphasise that there is no obligation for states to adapt their national legislation to the scope of the Rome Statute.²⁹⁹ The discriminatory effect is thus only an insinuation of the view that complementarity implicates the harmonisation of national legislation with the standard of the Rome Statute. Such a conclusion is in fact not part of the underlying concept of international criminal law. There are other provisions in the Rome Statute which could be made subject to the complementarity objection because national legislation does not allow prosecution under specific circumstances. Art 27 Rome Statute for example provides that a procedural rule hindering prosecution because of the defendant's status of immunity under national law does not bar the ICC from exercising jurisdiction.³⁰⁰

²⁹⁶ Ibid at 136.

²⁹⁷ Stoitchkova, *supra* note 13 at 170.

²⁹⁸ Ibid.

²⁹⁹ Kyriakakis, *supra* note 290 at 130 with further references.

³⁰⁰ Such a rule exists under German law. Pursuant to art. 46 (2) German Basic Law (*Grundgesetz*) a Member of Parliament may not be called to account or arrested for a punishable offence without permission of the Bundestag.

Moreover, it is not a viable way to circumvent the resistance of residual states by limiting the jurisdiction of the ICC to corporations registered in states that do recognise corporate criminal punishment. The practical consequence of this consideration is that the states resisting the adoption of corporate criminal liability would create safe havens for corporations doing business in the vicinity of human rights violations.³⁰¹ This solution is moreover questionable since it fails to take into account that states may indeed have a system of “effective, proportionate and dissuasive sanctions” other than criminal punishment.³⁰² To eliminate these problems, Haigh suggests an 'exception-based approach', according to which also civil or administrative proceedings against a corporation might exclude the jurisdiction of the ICC.³⁰³

But still corporations would most likely prefer these states as safe havens and exert great pressure on the government not to change the legal *status quo*. The adoption of corporate criminal liability is seen as a 'commercial disadvantage' in this regard.³⁰⁴ As examined in Chapter II, non-criminal regulation bears certain practical and procedural advantages for the defendant, especially the possibility of settling matters out of court. The aim of closing the regulatory (and enforcement) gap in terms of corporate human rights violations amounting to international crimes requires a level playing field which only international legislation can achieve. An extension of the ICC's jurisdiction to legal persons would with a view of the complementarity principle create a situation where national states 'have the ability to say, we either do this or the ICC will'.³⁰⁵

301 Cf Kyriakakis, *supra* note 290 at 130.

302 Cf Stoitchkova, *supra* note 13 at 172.

303 Kathryn Haigh, “Extending the International Criminal Court’s jurisdiction to corporations: overcoming complementarity concerns” (2008) 14:1 AJHR 199 at 213.

304 Kyriakakis, *supra* note 290 at 148.

305 *Ibid*.

4. Issues regarding substantive provisions

In contrast to business related crimes such as corruption or environmental crimes, the core international crimes as stipulated in arts 5 *et seqq* Rome Statute bear certain characteristics. The criminal conduct in part requires a large-scale commission or conduct in a specific context. Further, the crime of genocide (art 6 Rome Statute) presupposes a special intent exceeding the knowledge and intent regarding the *actus reus*. It is questionable to which extent corporations are legally, but also practically, capable of committing these crimes of special nature.

a. The requirement of state involvement

The involvement of corporations in human rights violations is in practice mostly described as indirect and participating. The ICJ Expert Legal Panel on Corporate Complicity in International Crimes for example accentuates three practically relevant factual situations: 'the provision of goods and services to those who commit crimes, the use of suppliers that commit crimes, and the commission of crimes by hired security services'.³⁰⁶ Speaking of complicity, it is commonly assumed that the primary responsibility lies with state actors. The corporation may be held liable as an accomplice in this type of situation.³⁰⁷ However, as illustrated, there might be other situations where the corporation is not only regarded as accomplice in someone else's offence, but rather as the main perpetrator.³⁰⁸

In terms of primary liability of corporations it is questionable whether state involvement actually constitutes a *legal* requirement. This question can be easily answered in the affirmative with regard to the crime of aggression. Pursuant to art 8 *bis* (1) Rome Statute the action of 'a person in a position effectively to exercise control over or to direct the political or military action of a State [*sic*]' is required.³⁰⁹ The crime of aggression is to be classified as a "leadership crime". A corporation can

³⁰⁶ International Commission of Jurists, *supra* note 103 at 37.

³⁰⁷ Clapham, *supra* note 154 at 907 *et seq.* with reference to ATCA litigation.

³⁰⁸ For an introduction to the ways TNCs can get involved in international crimes, see Chapter II.2.a.

³⁰⁹ Note that the amendments to the Rome Statute concluded at the Kampala Review Conference have not come to effect yet.

thus conceptually never be the principal perpetrator, but only an accomplice to the crime of aggression.

A differentiated examination is warranted regarding the crimes pursuant to arts 6 to 8 Rome Statute. The Nuremberg trials have established that non-state actors are in general subject of international law and capable of committing international crimes. Accordingly the ICTR found that also individuals not holding public authority or *de facto* representing the government, ie civilians, can be found guilty of war crimes.³¹⁰ It can be drawn from this jurisprudence that, provided the contextual element is present (ie an armed conflict), the legal status of the perpetrator is insignificant for liability and thus also corporations can commit acts of war crimes pursuant to art 8 Rome Statute.³¹¹

Similarly, the contextual requirement of crimes against humanity, a “widespread or systematic attack”, laid down in art 7 Rome Statute does not necessarily presuppose action on the part of the state. The definition in art 7 (2) (a) Rome Statute mentions a state policy as well as an '*organizational* policy' and thus expressly includes non-state collective entities. However, it is in doubt that a corporation can in practice be considered such an organisation and launch an attack against a civilian population itself.³¹² There is dispute as to the scope of the term organisation. While the jurisprudence of the ad-hoc tribunals interprets the element restrictively and requires a group of persons governing a specific territory,³¹³ it has been submitted that any group of persons may fulfil the requirement 'if it has at its disposal, in material and personnel, the potential to commit a widespread or systematic attack'.³¹⁴ It is conceivable that in particular private military firms have these resources. But in the actual case of an attack it would have to be reconsidered if the corporation still

310 Prosecutor v Jean Paul Akayesu, 2001.

311 Nerlich, *supra* note 166 at 904.

312 Ibid at 904 et seq.

313 Prosecutor v Tadic, 2000 at margin 653.

314 Werle, *supra* note 158 at margin 663; See further the detailed analysis of Gerhard Werle & Boris Burghardt, “Do Crimes Against Humanity Require the Participation of a State or a ‘State-like’ Organization?” (2012) 10:5 JICJ 1151.

acts in the pursuit of profit, or is not correctly classified as a criminal gang or terrorist group.

Genocide (art 6 Rome Statute) does not expressly require a contextual element so that a singular act by any individual would suffice, provided that it is carried out with the requisite genocidal intent. The jurisprudence of the ICTR and ICTY, however, argues that such an intent can hardly be accepted without a multitude of criminal actions backed by a corresponding plan and organisation.³¹⁵ The Element of Crimes to the Rome Statute even require that '[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'.³¹⁶ Even though theoretically TNCs may have the power to fulfil these requirements, it is highly doubtful in practice that such conduct occurs in the absence of the involvement of a state (or state-like entity).³¹⁷

Overall, it can be said that the complexities and magnitude of international core crimes limit its scope of application to corporations, in legal as well as in practical terms. Accordingly, criminal responsibility of TNCs is only conceivable in exceptional situations. These, however, will be of great concern to the international community so that the importance of a legal possibility to punish corporations for international crimes is not diminished by its practical rareness.

b. Specific intent (*dolus specialis*)

The crime of genocide pursuant to art 6 Rome Statute presupposes, additionally to the *mens rea* corresponding to the criminal conduct (*actus reus*), the intent to destroy a group as such. Apart from the practical likelihood that a multinational will ever get into the situation to be accused of principal perpetration of genocide,³¹⁸ it is

315 Nerlich, *supra* note 166 at 906 with further references to the ICTR cases of Kayishema and Ruzindana as well as the ICTY case Jelisić.

316 Cf Elements of Crimes (2002), ICC-ASP/1/3 (part II-B), art 6 (a) (genocide by killing).

317 Nerlich, *supra* note 166 at 906.

318 In terms of accomplice liability pursuant to art 25 (3) (b) to (e) Rome Statute, the genocidal intent is not required on part of the accomplice. Rather the requisite *mens rea* of the accomplice is directed to the special intent on part of the principal perpetrator.

questionable whether specific intent can be in fact existent on the part of a legal person and how it can be established.

First of all, it is noteworthy that the special intent requirement is of no distinct quality than the “general” subjective elements of *mens rea* pursuant to art 30 Rome Statute. Hence, the requirements of verifying special intent depend on the concept of corporate liability being adopted.³¹⁹ Derivative approaches such as laid out in the French proposal to art 25 Rome Statute uncover the specific intent in the mindset of the natural person and attribute it only in a second step to the corporate entity. The weakness of this method lies in the fact that in complex organisations with division of labour it is not necessarily the individual carrying out the *actus reus* who holds the requisite *mens rea*.³²⁰

Collective approaches in contrast are capable of establishing the special intent directly on the part of the legal entity. The *sui generis* approach by Stoitchkova introduced above broadens the focus from the individual to the 'corporate attitude as a manifestation of organisational *mens rea*'.³²¹ A similar method, establishing the mental state of a collective entity by inference from its individual members, has already been developed with regard to the specific intent of states and state organisations. In the Genocide Case, the International Court of Justice examined the conduct and attitude of individuals as well as official statements in order to establish genocidal intent with respect to governmental group VRS and even the State of Republika Srpska.³²² Cassese also reports from the approach of the Darfur Commission.³²³

319 As to the different approaches to construct corporate criminal liability, see above sect 1.

320 Stoitchkova, *supra* note 13 at 112.

321 *Ibid* at 133.

322 Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 2007.

323 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005.

We asked ourselves ... can we infer from all the actions of state agents (the Minister of Defence, the three Generals in charge of the Darfur area and the people fighting, the pilots and so on) that the state of Sudan was pursuing a genocidal intent ...? This was a question of analysing the practice, the behaviour of state agents and then of trying to infer from their behaviour whether or not there was an intent in the government³²⁴

He then draws a comparison and argues that this notion shall apply *mutatis mutandis* to corporations.³²⁵ Schabas advances this statement and suggests to replace the term intent with policy in regard to legal entities.³²⁶ This conceptual approach matches exactly with the findings of Chapter III.3.b., where the adaptation of the guilt principle towards rather functional criteria of accountability has been suggested.

324 Cassese in note 11 at 968.

325 Cassese in Ibid at 969.

326 Schabas in: Ibid.

VI. Conclusion

1. Summary of principal findings

Holding business corporations accountable for gross violations of human rights law amounting to international crimes poses a great challenge to the international community. The difficulties in grappling with business participation in international crimes traces back to the beginning of international criminal law, the Nuremberg trials. In particular transnationally acting corporations (TNCs) investing in regions governed by repressive states are at risk of becoming complicit in international crimes. To legally determine indirect involvement of corporations in crimes carried out by government forces or armed rebel groups is particularly difficult.

However, it is beyond question that criminal punishment must be the inevitable response to international “core” crimes. Given the gravity of the offences, civil liability or administrative sanctions might be suitable additionally, but not alternatively. Moreover, it is desirable to not only punish the individual corporate officials who actually carried out the criminal conduct, but also the corporate entity as such. Modern organisational theory reveals that the behaviour of individuals is essentially influenced by the organisational framework it acts in. The conviction of individuals can therefore not appropriately capture the dimension of the wrongful action on part of the collective entity. This holds especially true in the context of international crimes which in part feature a systemic (policy) element and in practice require collective action. Corporate punishment is further essential to reflect the non-hierarchical nature of modern corporate criminal endeavour. Relevant criteria from a criminological perspective, such as influence, policy, and cooperative strategies, can only be appropriately considered by prosecuting the corporation *as such*.

Criminal responsibility of corporations presupposes a conceptual paradigm shift in criminal law theory. In particular domestic legal systems with a civil law background are historically focussed on individual guilt, which implies the existence of a (human) moral actor. International criminal law has to a large degree been influenced

by this individualistic preoccupation, but is independent in its development. In fact, an adaptation of the notion of culpability towards more functional criteria for legal persons is warranted by the principle of effectiveness in regard to the grave nature inherent to core international crimes.

Although the notion of corporate criminal liability is on the rise on the domestic level and widely recognised in common law legal traditions, the enforcement of human rights by means of criminal law against large corporations is virtually non-existent. It can be questioned whether national states are actually capable of holding multinationals accountable. The flexible “de-nationalised” structure of TNCs creates jurisdictional problems for the state of incorporation when crimes are committed abroad. Host states, especially those with rich natural resources but politically unstable structures, are often *de facto* unable to prosecute with regard to the financial and political influence of large corporations.

In the absence of a coordinated national effort, regulation and enforcement at the international level is a worthwhile option for effectively ensuring accountability for corporate international crimes. However, although there is consensus that non-state actors, including private corporations, are bound by the underlying prohibition of international crimes, a norm providing for the criminal punishment of corporations in case of a breach is as yet not part of international law. No international legal instrument establishes an obligation for states to provide for the punishment of corporations for international crimes. A norm creating corporate criminal liability can also not be found under customary international law since the domestic theories of attributing criminal liability to corporations are not uniform and some states reject the notion entirely for conceptual reasons. Further, an attempt to extend the jurisdiction of the International Criminal Court (ICC) to legal persons found no acceptance during the drafting of the Rome Statute. In fact, no international criminal law tribunal has ever been vested with jurisdiction over legal entities and thus no precedence exists. Nevertheless, it is inspiring for future approaches how the United States Military Tribunal dealt with the direct business involvement in Nazi crimes.

Extending the jurisdiction of the ICC to corporations by amending the Rome Statute is a viable way for implementing the notion of corporate criminal

responsibility in international law. This requires certain substantial changes in the Rome Statute framework, in particular the adoption of a concept of imputing liability on the corporate entity. An indirect (derivative) approach has been favoured in international instruments. However, a holistic concept would be preferable in order to determine fault directly on the part of the corporation.

The complementarity regime of the ICC does not pose an insurmountable objection to extending the Court's *ratio personae* with regard to states not providing for criminal punishment of legal persons. It is rather an incentive to adapt the legal system since states are discharged from the burden of being solely responsible for prosecuting corporations complicit in international crimes. Yet, the practical scenarios conceivable where TNCs are liable as principal perpetrator are limited due to the special requirements of the core criminal offences pursuant to arts 5 to 8 Rome Statute. Particularly relevant remains, however, accomplice liability in situations where corporations participate in the crimes of state organs or rebel groups.

2. Prospective fields of study

This study can be seen as a fragment of a greater concept of accountability which warrants further exploration. More precisely there are two dimensions of such a greater concept. On a micro scale it may relate to the liability of legal persons as such. This includes bringing the notion of corporate criminal liability together with criminal liability of state(-like) organisations such as political parties and armed opposition groups,³²⁷ and ultimately of states themselves.³²⁸ Inspired by studies of collective behaviour and dynamics of organisational deviance, a synergy effect can be expected from a comparative study of the several theories revolving around

327 Cf Clapham, *supra* note 154 at 919 et seq noting that “[w]hile the practice concerning the criminalization of individual members of rebel groups under international law is now well-established ..., the question of whether the groups as such can be said to have violated international criminal law remains, however, unexplored”.

328 The notion of “Crimes of States” is not new and accepted in theory. However, in the past the implementation of state criminal responsibility was rejected for political reasons. For a thorough examination, see the study of Geoff Gilbert, “The Criminal Responsibility of States” (1990) 39:2 ICLQ 345.

holding different collectives responsible. A uniform concept of criminal liability of collective entities might be the outcome.

In extension of this “micro-level-concept”, there would also room for development on a macro scale. An all-embracing theory of criminal responsibility, comprising natural as well as legal persons, could be the result. On the lookout for a nexus binding together theories of state and individual liability for the crime of genocide, Schabas expressed his vision for a holistic concept of international crimes. He illustrates: 'It is like the nuclear physicists looking for the Higgs boson, the elusive particle that gives us a holistic theory of the universe. My own thinking right now is that there probably is a particle that links them together and that it is about state policy; it is about *policy crimes*'.³²⁹ This idea takes on the recent challenges in (inter-)national conflicts and modern warfare, which poses one of the major challenges to international law in the near future. The network-like rather than hierarchical structure of criminal endeavour requires a paradigm shift of the methods to establish criminal responsibility. Criteria such as influence, culture and policy are worthwhile to consider in this regard. Of course, before such a link can be found between the manifold landscape of liability theories, this progressive idea will have to undergo a lot of contention. However, it is more than worth an exploration. Since notions of individual as well as collective liability converge in international law, and offers room for development independent of traditional domestic legal systems, it offers an ideal environment. To pick up the analogy used by Schabas, only five years after this comment the Higgs boson has (most likely) actually been discovered. Hence, there is apparently a good chance to find this nexus in international criminal law too.

329 Schabas in note 11 at 965 (emphasis added).

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